(31,164)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 454

LEO A. PRICE, AS RECEIVER IN EQUITY OF J. M. GIDDING & CO., INC., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 21, 1925

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[fol. 1] **IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

No. E27-141

CHARLES H. MEARS, Complainant,

against

J. M. GIDDING & CO., INC., Defendant

JUDGMENT—Oct. 16, 1924

This cause having come on to be heard upon the objections and exceptions filed by Leo A. Price, as receiver of J. M. Gidding & Co., Inc., to the report of the Special Master filed herein on October 15, 1924, allowing the claim of the United States of America for income taxes and duties as a priority claim, and after hearing counsel, it is

Ordered and Decreed that the exceptions and objections filed to the report of the Special Master upon the claim of the United States of America be and the same hereby are overruled and the report of the said Special Master is hereby in all respects confirmed.

Further Ordered and Decreed that Leo A. Price, as receiver of J. M. Gidding & Co., Inc., be and he hereby is directed to pay out of the assets of the defendant in his hands, as priority claims, the claim of the United States of America for income taxes in the sum of $11,331.07 and the claim for duties in the sum of $1,086.70.

Dated, New York, October 16, 1924.

Francis A. Winslow, U. S. D. J.

[fol. 2] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPORT OF SPECIAL MASTER

Report of Wallace MacFarlane, Special Master

To the Judges of the District Court of the United States for the Southern District of New York:

Pursuant to an order of this court entered herein on the 14th day of March, 1924, wherein it was ordered that "Wallace MacFarlane be appointed special master to take testimony with respect to claims filed herein to which objection shall be taken by the receiver, and to report to this court his opinion and recommendations with reference thereto," I, the said special master, respectfully report as follows:

Appearances:

Messrs. Rosenberg & Ball (Godfrey Goldmark, Esq., of counsel) for the Receiver of J. M. Gidding & Company, Inc.

William Hayward, Esq., United States Attorney (Thomas J. Crawford, Esq., Assistant United States Attorney), for the Collector of Internal Revenue and Collector of Customs.

[fol. 3] The United States of America, through Charles W. Anderson, Collector of Internal Revenue for the Third New York District, filed a claim with the receiver of J. M. Gidding & Company, Inc., the defendant above named, in the amount of $16,912.29 for additional income taxes assessed against said company for the year 1920 (Ex. A). This tax was reduced on revision to $15,112.47
and was not assessed until after the appointment of the receiver (Exs. B & C).

For the fiscal year ending January 31, 1923, income tax was assessed against Gidding & Company in the sum of $6,299.82
On revision this tax was reduced to 2,518.42

Making an overassessment of 3,781.40

The receiver was appointed in this action on October 2, 1923. Prior to the appointment of the receiver Gidding & Company had paid ½ of the uncorrected tax for 1923 ..... $3,149.91
and the receiver on or about March 29, 1924, also before the reduction of the tax for 1923, paid the remaining half (Ex. E) 3,149.91

When the government reduced the tax for 1923 from $6,299.82 to $2,518.42, it credited the overassessment of 3,781.40

(Ex. D), already paid, as aforesaid, upon the unpaid taxes for 1920, leaving the net claim of the government for income taxes (Ex. C).... $11,331.07

For this amount, $11,331.07, the government claims a right to [fol. 4] priority of payment. The receiver admits the net amount of the claim as above stated, but disputes the right to priority.

If priority is denied, the government's claim for income taxes will, of course, be allowed as a general claim, and the amount will be adjusted rather differently. The government concedes the overpayment of $3,781.40 of income tax assessed against Gidding & Company for 1923. If the government's claim for the income tax of 1920 is entitled to priority, this overpayment is correctly treated as a payment on the gross amount of that tax reducing it to $11,331.07; but if the government is only a general creditor, then it is not entitled to apply this overpayment on the principal of its claim for income taxes for 1920, because, as a general creditor, it would be entitled to divi-

dends only, which the receiver claims will not exceed forty per cent and may be considerably less. It is agreed by the parties (M., pp. 3, 4) that this overpayment on the income tax of Gidding & Company for the year 1923 should be divided as follows:

Paid by Gidding & Company prior to the receivership..	$631.49
Paid by the receiver in 1924	3,149.91
	$3,781.40

The receiver, therefore, claims that if it is held that the government is only a general creditor for the income tax of 1920, that claim should be liquidated as follows:

Total tax as revised	$15,112.47
Less overpayment by Gidding & Company on tax of 1923	631.49
Making the net claim of the government as a general creditor	$14,480.98

[fol. 5] and that the receiver is entitled to retain as a setoff against this erroneous overpayment to the government of $3,149.91 by the receiver all dividends heretofore or hereafter declared upon a government claim of $14,480.98 until the estate has recouped the full amount of such overpayment by the receiver.

The receiver's opposition to the government's claim of priority rests on Equitable Trust Co. v. Conn. Brass & Mfg. Corp., 290 Fed. 712, and the interpretation in that case of U. S. R. S. 3466. That case did not involve a claim by the United States for taxes. This claim is for taxes and falls directly within the decision of Knox, D. J., in Liberty Ins. Co. v. Johnson Shipyards Corp., rendered on July 23, 1924, which, so far as the master is informed, has not yet been reported. On the authority of that decision I sustain the claim of the government to priority of payment, and liquidate its claim as follows:

Income tax for the year 1920.....	$11,331.07
For liquidated duties (M., p. 9).....	1,086.70
Total	$12,417.77

I return herewith:

(1) Stenographer's minutes, pp. 1-10.

(2) Exhibits A, B, C, D and E relating to the claim for arrears of income taxes, and Exhibits F, G, H, I and J relating to the undisputed claim for liquidated customs duties.

Dated October 15, 1924.

(Sd.) Wallace MacFarlane, Special Master.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Wallace MacFarlane, Esq., Special Master

MINUTES OF HEARING BEFORE SPECIAL MASTER

(Claim of United States of America)

Thursday, October 2nd, 1924—10:30.

Appearances:

Messrs. Rosenberg & Ball (Godfrey Goldmark, Esq., of Counsel), for the Receiver of J. M. Gidding & Company.

William Hayward, Esq., United States Attorney (by Thomas J. Crawford, Esq., Assistant United States Attorney, of Counsel), for the Collector of Internal Revenue and Collector of Customs.

Mr. Goldmark: The proof of claim for 1920 taxes, which I ask to be marked in evidence, was for $16,912.29, for income taxes for the year 1920. I produce the proof of claim, sworn to by the Collector of Internal Revenue March 21st, 1924,

Marked Receiver's Exhibit A.

Mr. Goldmark: I also offer original letter from the Treasury Department at Washington, dated May 15, 1924, addressed to J. M. Gidding & Company, from which it appears that the tax liability [fol. 7] for the year 1920 is, instead of the figures mentioned in the proof of claim, the sum of $15,112.47, and it also shows that there was an over assessment of $3,781.40 for the fiscal year January 31st, 1923, as shown in detail in an attached statement. Unless asked for, I will not put in the statement showing the details.

Mr. Crawford: That is not necessary. We concede the over assessment.

Letter refered to marked Receiver's Exhibit B.

Mr. Goldmark: I also offer the notice and demand for the tax received from the office of the Collector of Internal Revenue for the Third District showing the sum of $11,331.07 as the amount claimed to be due.

Mr. Crawford: No objection.

Notice and demand referred to marked Receiver's Exhibit C.

Mr. Goldmark: The original tax for 1923 was $6,299.82. The tax liability, as readjusted for that year, was only $2,518.42, so that there was an over assessment for the year 1923 of $3,781.40. I offer a communication from the Deputy Commissioner of Internal Revenue, being a certificate of over assessment which shows those facts:

Mr. Crawford: No objection.

Communication from the Deputy Commissioner of Internal Revenue referred to marked Receiver's Exhibit D.

Mr. Goldmark: Mr. Crawford, is it conceded that of the original assessment for 1923, amounting to $6,299.82, one-half of that sum,

to wit, $3,149.91, was paid by the defendant prior to the appointment of the Receiver, and that the balance, to wit, $3,149.91, was paid by the Receiver since his appointment?

Mr. Crawford: Advise me of the date of the appointment of the Receiver.

[fol. 8] Mr. Goldmark: October 2nd, 1923.

Mr. Crawford: I would rather state it this way: According to the information which I have received from the office of the Collector of Internal Revenue there was a payment on account of this 1923 tax made on April 20th, 1923, in the sum of $1,574.95, apparently representing one-quarter of the total amount, and another quarterly payment of $1,574.96 on June 17th, 1923. I am also informed that there was a payment made to the Collector of the Third District on June 11th, 1924; apparently it was made by the Receiver, of $3,149.91.

Mr. Goldmark: Now, Mr. Crawford, the fact then is, is it not, that there was an over assessment for 1923, and an over payment for 1923 of $3,781.40?

Mr. Crawford: Exactly. The amount of the over assessment represents the amount of the over payment.

Mr. Goldmark: And, therefore, as the Receiver paid $3,149.91, on that over payment, he paid that amount just mentioned, and the Gidding corporation itself paid the difference of $631.49?

Mr. Crawford: Yes, that is conceded.

Mr. Goldmark: The Receiver, therefore, contends that if the Government's claim is entitled to a priority, there must be deducted from the claim for the 1920 tax, in the sum of $15,112.47, the full over payment, making the priority claim $11,331.07. If, on the other hand, it is held that the Government claim is not entitled to priority, then the Receiver contends that there should be deducted from the $15,112.47 the amount paid by Gidding, to wit, $631.49, leaving a balance of $14,480.98, and that this is a general claim, and that [fol. 9] against any dividend payable upon that claim there must be deducted the Receiver's payment of $3,149.91.

I offer in evidence the check by which the Receiver paid the sum of $3,149.91, to be sent to the Master and marked when received Receiver's Exhibit E.

Mr. Crawford: No objection.

Check referred to marked Receiver's Exhibit E.

Mr. Goldmark: I offer in evidence the bill of complaint, the answer, and the order appointing the temporary receiver, and also the order of Judge Learned Hand, dated January blank—the date is omitted here—1924, appointing a permanent receiver herein. In this case an order was made directing the filing of claims with the Receiver on or before March 1st, 1924.

Mr. Crawford: I have no objection to the papers mentioned by Mr. Goldmark being deemed before the Special Master for the purposes of this claim. I do not see any necessity for their being marked as exhibits.

Mr. Goldmark: I want them put in the record.

Mr. Crawford: We will not question for a moment the regularity of the receivership proceedings in the equity receivership suit. Since Mr. Goldmark desires the papers to be put in, I have no objection to their being marked as exhibits.

Mr. Goldmark, I notice that the proof of claim which you have marked in evidence, covering the 1920 income tax in the larger amount before it was reduced, is sworn to on the 21st of March, 1924, apparently several weeks after the expiration of the time fixed by the order. You don't intend to make any point of that, do you?

Mr. Goldmark: I do not. I shall assume that the claim was [fol. 10] filed within the time specified, or that an order for filing nunc pro tunc was obtained.

This business was continued until the 7th of January by the temporary receiver, and on the 9th of January he was appointed permanent receiver. Thereupon the assets of the corporation were liquidated with the result that the net assets in the hands of the Receiver will be insufficient to pay all the allowed claims 100 per cent.

Mr. Crawford: I have no objection to your statement going on the record, but I ask Mr. Goldmark whether he is in a position to state whether at the time of the commencement of the suit the assets were sufficient to pay the creditors in full?

Mr. Goldmark: The bill of complaint alleges that if the assets were sold in the ordinary course of business that they would yield more than enough to pay the creditors. I am unable to state what a forced sale of the assets would have brought at the time of the Receivership.

Mr. Crawford: What was the nature of the assets?

Mr. Goldmark: A stock of Merchandise in four established and running dress shops in the city of New York, Philadelphia, Washington, Cincinnati and Duluth (perhaps that is five).

Mr. Crawford: You have no other information regarding the value of the assets as of the date of the commencement of the suit other than the statement in the bill of complaint. You said, I believe, that the bill of complaint contained an allegation that the assets were worth—

Mr. Goldmark: What do you mean by "value"?

Mr. Crawford: Market value.

Mr. Goldmark: I am unable to state the market value of the stock of merchandise in the five stores.

[fol. 11] Mr. Crawford: Did you have an appraisal made after the appointment of the Receiver?

Mr. Goldmark: We did not, as I remember it, but I believe there was an inventory.

Mr. Crawford: Do you know what the inventory values were?

Mr. Goldmark: The book values.

Mr. Crawford: Yes. Whatever the inventory values were, do you know what they were?

Mr. Goldmark: I do not know now. I will say this, there were attempts to reorganize this business, and those attempts failed, which resulted in a liquidation by the receivership.

Mr. Crawford: Is this receivership about to be closed?

Mr. Goldmark: This receivership cannot be closed until this and other disputed claims have been disposed of.

The Master: He is asking whether there is a probability of a speedy closing?

Mr. Crawford: Are you in a position now to state about what the amount of the general claims allowed will be and what dividends will be paid on general claims. I understand it is just your opinion.

Mr. Goldmark: If certain large claims pending before the Master are not allowed, the general creditors will receive approximately 40 per cent of the amount of their claims. If these claims pending before the Master are allowed to share in dividends, then the general creditors will probably not receive more than 30 per cent.

In addition to the foregoing claim, the United States has filed five claims for customs duties aggregating the sum, the amount of which is not in dispute, of $1,086.70. The receiver, however, contests [fol. 12] the Government's rights to priority. These proofs of claim are all in the same form. And I offer the five proofs of claims.

Mr. Crawford: No objection.

Claim for $605.90 marked Receiver's Exhibit F.

Claim for $64.95 marked Receiver's Exhibit G.

Claim for $15 marked Receiver's Exhibit H.

Claim for $120.50 marked Receiver's Exhibit I.

Claim for $280.35 marked Receiver's Exhibit J.

Mr. Goldmark: I claim, both as to taxes and duties, that the right of the United States to priority, if priority exists, must be a statutory right, and that there is no statute that prefers any claim of the United States, whether it be, what is technically called a tax, or what is ordinarily called a debt, except in the specific cases set forth in Section 3466 of the Revised Statutes of the United States, none of which cases includes a suit such as this. I claim as a matter of fact, that the word "debt" in Section 3466 of the Revised Statutes, having in mind its history, includes both taxes, duties, and ordinary contractual debts due the United States of America, and, therefore, as Section 3466 is not applicable, there is no right of priority for taxes, as above stated, and I claim that there is no inherent right of priority in the Federal Government for the payment of taxes based on rights of sovereignty.

(Briefs to be exchanged and submitted.)

[fol. 13] IN UNITED STATES DISTRICT COURT

EXHIBIT A IN EVIDENCE

[Title omitted]

Settlement of Claim for Taxes Due the United States

Comes Charles W. Anderson, Collector of Internal Revenue for the Third Collection District of New York, a duly authorized agent for

the United States in this behalf, and says that J. M. Gidding & Co., Receivership, is justly and truly indebted to the United States of America for Internal Revenues Taxes as follows:

Nature of tax and statute involved (Give Section or Sections): Income Rev. Act of 1918.

Year or taxable period ended 1920.

Amount of Tax: 16,912.29, together with interest at 1% per month until Interest began.

That no part of said taxes or interest has been paid but that the same are now due and payable at the office of said Collector of In-[fol. 14] ternal Revenue at 250 W. 57th St., New York City, New York.

That no security therefore is held by the United States and that there are no set-offs or counterclaims.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being fully determined by Section 3466 of the Revised Statutes and Section 64 (a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Dated this 21st day of March, 1924.

Charles W. Anderson, Collector of Internal Revenue for the Third Collection District of New York.

Sworn to and subscribed before me this 21st day of March, 1924. Ruth Raber, Dep. Coll.

[fol. 15] [Title omitted]

Proof of Unsecured Preferred Debt Due U. S. Government

724 Fifth Ave., N. Y.

Charles W. Anderson, Collector of Internal Revenue, 3rd District of N. Y., 250 West 57th Street, New York, N. Y., to Leo A. Price, Temporary Receiver, Rosenberg & Ball, Solicitors for Receiver, 74 Broadway, New York:

[fol. 16] U. S. of America,
State & County of N. Y.,
Southern Dist. of N. Y., ss:

—— ——, being duly sworn, says: He is over 18 years of age and resides at ——. On —— —, ——, he served a Claim of which

within is a copy, on —— —— in the within entitled proceeding by delivering the Claim to and leaving it with him, delivering the Claim and leaving it with —— ——, the person in charge of his office (he being absent therefrom at the time), depositing the Claim in a securely sealed postpaid wrapper addressed to him at his office No. —, in said County.

Deponent knows the person so served to be the official designated as aforesaid.

—— ——.

Sworn to before me this — day of ——, 192-. —— ——.

———

[fol. 17] IN UNITED STATES DISTRICT COURT

EXHIBIT B IN EVIDENCE

Treasury Department, Washington

(Emblem)

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT: CA-2112-3-App.

May 15, 1924.

J. M. Gidding Company, 564-5th Avenue, New York, N. Y.

SIRS: An examination of your income tax returns and of your books of account and records for the fiscal years ended January 31, 1920, to January 31, 1923, discloses an additional tax liability for the fiscal year ended January 31, 1920, amounting to $15,112.47 and an overassessment of $3,781.40, for the fiscal year ended January 31, 1923, as shown in detail, in the attached statement.

You are advised that in order that the collection of this tax may not be jeopardized by the delay incident to the giving of the usual thirty day notice as provided for in Section 250 (d) of the Revenue Act of 1921, an immediate assessment by the Commissioner of Internal Revenue will be made.

The Bureau will however, entertain a claim in abatement if filed [fol. 18] within ten days of receipt of notice and demand from the Collector of Internal Revenue for your district in accordance with the provisions of Article 1006 of Regulations 62.

An appeal covering the basis of the claim should be filed setting forth in full all information upon which you base your protest against the assessment shown in this letter. This appeal should be filed in triplicate and should be addressed to the Commissioner of Internal Revenue for the specific attention of IT:CA-2112-3-App. On request a conference will be arranged prior to a final decision.

If an appeal is not filed payment should be made upon receipt of notice and demand from the Collector of Internal Revenue for your district.

Respectfully, J. G. Bright, Deputy Commissioner, by F. R. Clute, Head of Division.

Enclosure: Statement.

[fol. 19] IN UNITED STATES DISTRICT COURT

EXHIBIT C IN EVIDENCE

Income, War-profits, and Excess-profits Tax

Notice and Demand for Tax

Form 7658

United States Internal Revenue Service

Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, the Act provides that a penalty of 5 per cent of the amount of tax due will be added, plus interest at the rate of 1 per cent per month, from Jun. 24, 1924, until paid.

Date Jun. 24, 1924.

Name and address: Gidding Co., J. M., 724 5th Ave., New York, N. Y.,

May 00 SPL, 4.

Return this form with remittance.

9. 10284.

To avoid penalty and interest this tax must be paid to the Collector of Internal Revenue at 250 W. 57th St., N. Y. C., not later than Jul. 5, 1924.

Collector's paid Stamp.

Date: —— —, ——.

To the Collector of Internal Revenue:

I inclose herewith the sum of $— in payment of the tax shown below.

Name: —— ——. Address: ——.

Items: 1/31/1920 Fisc OL 5/15/24 NC 250 D.

Total assessment: 11,331.07.

Stamped across the above form of letter was the following: Important. This bill with remittance must be returned to Collector of Internal Revenue 3rd District of New York, Fisk Bldg., B'way & 57th St., N. Y. City.

[fol. 20] IN UNITED STATES DISTRICT COURT

EXHIBIT D IN EVIDENCE

Treasury Department

Office of Commissioner of Internal Revenue, Washington

(Emblem)

Income Tax Unit IT:R:CC.

Certificate of Overassessment

Number: 663894. Allowed: $3,781.40. Schedule No. 10284

J. M. Gidding Company, 724 Fifth Avenue, New York, New York.

SIRS: An audit of your income tax return, form 1120 and a consideration of all the claims (if any) filed by you for the fiscal year ended January 31, 1923, indicates that the tax assessed for this year was in excess of the amount due:

Original tax, 1923 List, Account #412114	$6,299.82
Tax liability	2,518.42
Overassessment	$3,781.40

The audit as made has been approved by this office.

The amount of the overassessment will be abated, credited, or re-[fol. 21] funded as indicated below. (You will be relieved from the payment of any amount abated: if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Respectfully, J. G. Bright, Deputy Commissioner, by F. R. Clute, Head of Division.

Abated: $3,149.91. May 1924, Trans. L.
Credited: $631.49. May 00 Sp 4 Wash 1924 L.
Year: ——.
Account No.: ——.
Instructions executed.

(Signature) Charles W. Rudeady, Collector Int. Rev., 3rd District of New York.

Refunded: $—.

(7776) Revised July, 1923. Government Printing Office 2—11665.

[fol. 22] IN UNITED STATES DISTRICT COURT

EXHIBIT E IN EVIDENCE

Guaranty Trust Company of New York, Fifth Avenue Office

1-107

No. 68. New York, 3/29, 1924.

Pay to the Order of Collector of Internal Revenue Three Thousand One Hundred Forty Nine Dollars Ninety One Cents.

Payable through the New York Clearing House.

J. M. Gidding & Co., Inc. Leo A. Price, Receiver.

$3,149.91.

Endorsements: Collector of Internal Revenue, 2nd Dist., New York, Received 9 Apr. 1/24. Collector of Internal Revenue, 3rd Dist., New York, Received Apr. 3/24. Pay to Federal Reserve Bank—April 8th, 1924—Charles W. Anderson, Collector of Internal Revenue. Fisk Building, Broadway & 58th St., N. Y. C. Federal Reserve Bank of New York—Received Payment Apr. 10/24.

[fol. 23] IN UNITED STATES DISTRICT COURT

EXHIBIT F IN EVIDENCE

SJK. Preferred.

[Title omitted]

Proof of Claim for Duties

At the City of New York in the said Southern District of New York, on the 5th day of August, 1924, came Walter R. Eaton, an Acting Deputy Collector of Customs in the office of the Collector of Customs of the Port of New York, and made oath and said that J. M. Gidding Co., Inc., against whom a petition in bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to the United States of America as a preferred claimant by virtue of the provisions of Section 64a of the Bankruptcy Act in the sum of Six Hundred and Five Dollars and Ninety Cents ($605.90), representing balance of duties due on Entry No. 304472 covering an importation of model hats ex SS. Paris, July 25, 1921.

That no part of said claim has been paid; that there are no set-offs or counterclaims to the same, and neither the said Collector of Customs nor deponent nor any person by their order or to the knowledge

[fol. 24] or belief of deponent has had or received any manner of security whatsoever.

Walter R. Eaton, Acting Deputy Collector of Customs Port of New York.

Subscribed and sworn to before me this 5th day of August, 1924. Samuel J. Katzberg, Commissioner of Deeds, City of N. Y. (Seal.)

It is stipulated that Exhibits G to J inclusive are respectively in the same form as the foregoing exhibit.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT

To the District Court of the United States for the Southern District of New York:

Charles H. Mears, a citizen and resident of the State of Pennsylvania, brings this, his Bill of Complaint, on his behalf and on behalf of all the creditors of J. M. Gidding & Co., a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of said State, and thereupon alleges as follows:

First. The complainant is a citizen of the State of Pennsylvania and a resident of said state, residing at Philadelphia therein.

Second. That upon information and belief, the defendant is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, and is a citizen of said State, and has its principal office and place of business in the Borough of Manhattan, City of New York, and Southern District of New York.

Third. Upon information and belief, defendant is engaged in the business of importing and selling at retail wearing apparel for Women. Defendant has branch stores at Cincinnati, O., Duluth, [fol. 26] Minn., Philadelphia, Pa., and Washington, D. C.

Fourth. The assets of the defendant consist of merchandise, moneys in bank, accounts receivable, furniture and fixtures. Defendant has a large stock of merchandise and other assets in the Borough of Manhattan, City of New York, within the jurisdiction of this Court.

Fifth. On information and belief, the defendant is indebted to the complainant for the sum of $10,000 upon the prommissory note of the defendant heretofore made and delivered, wherein for value received, the defendant promised to pay to its own order three months from date, the sum of $10,000. Defendant thereupon

endorsed said note in blank and delivered said note, for value, and the complainant is now the owner and holder of said note. Said note was not paid at its maturity. All holders of said note prior to complainant at all times herein mentioned, were and now are citizens and residents of the State of Pennsylvania and could have prosecuted this suit in this court if no assignment or transfer of said note had been made.

Sixth. Upon information and belief, defendant is indebted to the complainant and other creditors in a sum in excess of $1,500,000. Of said sum, the defendant is indebted to various banks in the sum of approximately $500,000.

Seventh. Upon information and belief, the defendant is at the present time without funds sufficient to meet its present obligations or its obligations due or shortly to mature, although complainant is [fol. 27] informed and believes, and therefore alleges, that if the assets of the defendant, particularly its large stock of merchandise, can be sold or liquidated in the usual and ordinary course of defendant's business and under management, that its assets will be largely in excess of its lawful obligations. Upon information and belief, defendant has quick assets of a value nearly equal to the amount of its liabilities, and, in addition, has other slow assets of approximately $1,000,000.

Eighth. Upon information and belief, certain of the creditors of the defendant are pressing their claims for payment, and are endeavoring in various ways to enforce their respective claims, and certain creditors have already commenced suit against defendant to enforce their claims. If the assets of the defendant are given no protection, there may not be enough to pay all creditors, should the assets be abandoned to the general waste of separate legal proceedings. Complainant further alleges that further actions on the part of the creditors of the defendant will result in judgments, attachments, executions and seizures by sheriffs and other like officers, and force piecemeal sales of the property and assets of the defendant, with the necessary consequences, that the defendant will be hampered in the operation of its business, and complainant will sustain irreparable injury.

Ninth. Complainant is informed and believes that if the defendant's assets are not taken into judicial custody, actions at law may be instituted by some of the creditors, who are pressing for paying of their claims, and through such actions such creditors may obtain judgments and executions, and inequitable preference as against the [fol. 28] complainant and other creditors of the defendant might result and the assets may not be enough to pay all the creditors of defendant. Likewise, unless assets of the defendant are administered by a Court of Equity and all actions and proceedings of law, including executions, attachments and other proceedings enjoined, the complainant feels that the defendant will be subjected to litigations which will result in an interruption of its business and a consequent serious dissipation of its assets.

Tenth. That in order that the property of the defendant may be preserved for equitable distribution among those entitled thereto, the complainant believes that this Honorable Court should intervene and appoint a receiver to take charge of all of the needs of the defendant who shall conduct, manage and administer the same under the power to be conferred upon him in the proposed decree herewith submitted.

Eleventh. The complainant shows that the amount of the controversy in this action is in excess of Three Thousand Dollars ($3,000) exclusive of interest and costs.

Inasmuch, therefore, the complainant has no adequate remedy at law and can have relief only in equity, the complainant files this bill of complaint on behalf of itself and other creditors of the defendant who may hereafter join herein and prays for equitable relief as follows:

1. That this Honorable Court will administer all the properties, assets and effects, rights and business belonging to the defendant and will adjudicate, enforce, adjust and determine the rights, equities [fol. 29] and claims of all the creditors of the defendant, including the claim of the complaint.

2. That this Honorable Court will forthwith appoint a receiver or receivers of all and singular the property of the defendant, of whatsoever nature, with full power to take into their possession, hold and manage the same under the direction of this Court, with such powers as this Court may from time to time grant; to continue the business, in his discretion, to bring suit for, collect, receive and take into their possession all the property and assets of defendant, including books, records, vouchers, checks, moneys, real estate and all other property, real, personal and mixed; to institute, prosecute, become parties to, intervene in, compromise or defend any actions at law or in equity or under any statute for the recovery, protection and maintenance of any of the assets or properties of defendant, as they may deem necessary or proper, including the institution and prosecution of any such ancillary proceedings as they may deem advisable; to settle, collect, compound, adjust or make allowance upon any debt that may be due or owing to the defendant as they may deem proper; to pay any such claims or wages, or otherwise, as may have priority; and in general, with all the usual powers of receivers in such cases.

3. That the officers, managers, employees, creditors and stockholders of the defendant and all other persons, firms and corporations be required forthwith to transfer, convey and deliver up to such receiver or receivers possession of all property of the defendant, wheresoever situate.

4. That all persons, firms and corporations, be enjoined from in- [fol. 30] stituting, commencing, prosecuting or continuing the prosecution of any actions, suits, or proceedings at law or in equity, or under any statute against defendant, or from levying, or serving any attachments or executions or other processes upon the defendant

or upon or against any of the property of the said defendant, save and except the filing of mechanic's or other statutory liens, and generally that all persons, firms and corporations be enjoined from doing any act to interfere with said receivers in their possession of the property of defendant.

5. That a Writ of Injunction issue out of and under the seal of this Honorable Court or issue by one of your Honors, directing, enjoining, and restraining defendant and its officers, directors, agents and employees, and all other persons whatsoever from interfering with, transferring, selling or disposing of any of the property of said defendant.

6. That this Honorable Court will grant a Writ of Subpœna under the seal of this Honorable Court, directed to defendant, and commanding it on a date certain therein named, before this Honorable Court, to answer (but not under oath, answer by oath being expressly waived), all and any of premises, and to stand by, perform, and abide by such orders and decrees as may be made by this Honorable Court.

7. That a decree appoint a receiver or receivers of the property of the defendant and granting the relief prayed for in this bill of complaint may be granted by this Honorable Court in the form herewith submitted.

8. That at such time as may be found just and proper the prop-
[fol. 31] erties of the defendant may be ordered to be sold, in whole, or in part, for cash or on credit, in such manner and upon such terms and conditions as this Court may deem just and equitable, and that any such decree of sale shall make proper and equitable provision for the preservation of all equities, rights, properties, claims and liens of all creditors and shall provide for the sale of the property of the defendant subject to or free of liens and encumbrances, in whole or in part, as this Court may direct, and that the proceeds of any such sale be distributed among those entitled thereto, as this Honorable Court shall adjudicate, or that the properties of the defendant, in whole or in part, may be returned to it; and that the complainant may have such other and further relief in the premises as may be just and equitable, and that the defendant may be directed to make such bills of sale, assignments, transfers and conveyances of any such property as may be directed to be sold by this Court.

9. That such order shall be made by this Honorable Court, as to the service of this Bill of Complaint, and of any order that may be made in this suit as may be deemed sufficient and proper by this Court.

10. That the complainant may have such other and further relief as may be just and proper.

And the complainant will ever pray.

Rosenberg & Ball, Solicitors for Complainant, 74 Broadway, New York City. Wilbur L. Ball, of Counsel.

[fol. 32] Sworn to by Wilbur L. Ball. Jurat omitted in printing.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

J. M. Gidding & Co., Inc., the defendant in this cause, for answer to the Bill of Complaint, says:

First. That the defendant admits all of the allegations in said Bill of Complaint.

Second. That defendant joins in the prayer of said Bill of Complaint.

J. M. Gidding & Co., Inc., Defendant. Rose & Paskus, Solicitors for Defendant.

Sworn to by Nathaniel Gidding; jurat omitted in printing.

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPOINTING TEMPORARY RECEIVER

And now, on the 2nd day of October, 1923, this cause came on to be heard upon the Bill of Complaint duly filed herein and the answer of the defendant hereto this day likewise filed, and upon a motion of the complainant for the appointment of a receiver or receivers, and after due deliberation, it was, on motion of Rosenberg & Ball, solicitors for complainant,

Ordered, Adjudged and Decreed, that the complainant is upon the facts contained in said bill, and upon said answer, entitled to the relief prayed for in the complaint and herein granted, and it was further

Ordered, Adjudged and Decreed as follows:

That until the meeting of creditors hereinafter provided, Leo A. Price, Esq., be and he hereby is appointed temporary receiver of the above named defendant, and all of the property, assets and effects of said defendant, or in which the said defendant has any ownership or interest, whether such property be real, personal and mixed, and of whatsoever kind and description, and wheresoever situated, and all office furniture, fixtures, books of account, records and other [fol. 35] books, papers and accounts, cash on hand or in bank or on deposit, things in action, credits, stocks, bonds, securities, shares of stock, notes or bills receivable, muniments of title, as well as all other property of every character and description whatsoever of the defendant, and it was further

Ordered, Adjudged and Decreed, that the said Receiver be and he hereby is authorized forthwith to take possession and control and custody of all said property, assets and effects of said defendant; that said Receiver is authorized to continue the business of the defendant until the creditors meeting hereinafter provided, and to do all and any things and enter into all or any agreements as may be deemed by them necessary or advisable for such continuance of business, or to preserve and protect the said property or assets, and to employ and discharge and fix the compensation of such managers, agents and employees as may, in his discretion, be necessary or advisable in the administration of this estate; to employ accountants and counsel, and to make such payments and disbursements as may be needful or proper in the preservation of the assets of the defendant and the continuance of such business.

Said Receiver is further authorized and empowered to institute, prosecute, defend, compromise, adjust, intervene in or become party to such suits, actions or proceedings at law or in equity, including ancillary proceedings in state or federal courts, as may in his judgment be necessary or proper for the collection and preservation of the assets of the defendant or the carrying out of the terms of this decree, and likewise to defend, compromise or adjust, or otherwise dispose of all or any suits, actions or proceedings instituted against [fol. 36] him as Receiver or against the above named defendant, and also to appear in and conduct the prosecution or defense of any suit, or adjust or compromise any actions or proceedings now pending in any court by or against the said defendant where such prosecution, compromise, defense or other disposition of such suit or action will, in the judgment of said Receiver, be advisable or proper for the protection of the assets of the above named defendant, and such Receiver is authorized to settle with, compromise, collect from or make allowance to debtors of the defendant as he, the said Receiver, may deem advisable; and generally said Receiver is authorized to do all acts, enter into any agreements and accept, adopt or abandon any or all contracts as may be deemed by such Receiver advisable for the protection or preservation of the assets of the above named defendant, and it was further

Ordered, Adjudged and Decreed, that the bond of said Receiver, in the sum of Thirty Thousand Dollars, conditioned that he will well and truly perform the duties of his office and duly account for all moneys and property which come into his hands and abide by and perform all things which he shall be directed to do, with sufficient sureties to be approved by a Judge of this Court, be filed with the Clerk of this Court within two days from the date of this order, and it was further

Ordered, Adjudged and Decreed, that said defendant and each and every of its officers, directors, agents and employees, and all other persons claiming to act by, through or under or for said defendant, and all other persons, firms and corporations, including creditors [fol. 37] and stockholders of the defendant, and including all sheriffs, marshals, constables, and their agents and deputies and all other officers are hereby enjoined from transferring, removing, disposing of

or attempting, in any way, to remove, transfer or dispose of or in any way interfere with any of the properties owned by or in the possession of said defendant and all said persons, firms and corporations are enjoined from doing any act whatsoever to interfere with the possession and management by said Receiver of the properties of the defendant or in any way to interfere with the said Receiver in the discharge of his duties, or to interfere in any way with the administration and disposition in this suit of the affairs and properties of the defendant, and all creditors and stockholders of the said defendant are hereby enjoined from instituting or prosecuting or continuing the prosecution of any pending actions, suits, or proceedings at law or in equity, or under any statute, against the said defendant, and from levying any attachments, executions, or other process, upon or against any of the properties of said defendant, or from taking or attempting to take into their possession any of the properties of said defendant, and from issuing or causing the execution or issuance out of any court of any writ, process, summons, subpœna, replevin or attachment, and it was further

Ordered, Adjudged and Decreed, that the said temporary receiver shall cause ten days' notice to be given by mail to all known creditors of the defendant of a meeting to be held before the undersigned Judge of this Court, in Court room No. Three, on the 12th floor of the Woolworth Building, 233 Broadway, Borough of Manhattan, City of New York, within twenty (20) days from the date hereof, [fol. 38] at which meeting the court will entertain and consider such applications as may be made with reference to the further continuance of the business and the continuance of the receivership and who shall be the permanent receiver and make such orders in respect thereof as to the court may seem just and proper.

Dated, New York, October 2nd, 1923.

Learned Hand, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPOINTING PERMANENT RECEIVER

A decree having been made herein on October 2nd, 1923, appointing Leo A. Price as temporary receiver of the above-named defendant until a meeting of the creditors of said defendant to be held on October 18th, 1923, and said meeting having been duly held and a decree having been made herein on October 18th, 1923, continuing the said Leo A. Price as temporary receiver of the defendant for a further period of thirty days from said date, and a [fol. 39] decree having been made herein on November 15th continuing the said Leo A. Price as temporary receiver of the defendant for a further period of sixty days from said date, and this cause further having come on to be heard and the Court being fully advised in the premises, it is

Ordered, Adjudged and Decreed that Leo A. Price, Esq., the temporary receiver herein, be and he hereby is continued and appointed permanent receiver of the above-named defendant, and all of the property, assets and effects of said defendant, or in which the said defendant has any ownership or interest, whether such property be real, personal and mixed, and of whatsoever kind and description, and wheresoever situated, and all office furniture, fixtures, books of account, records and other books, papers and accounts, cash on hand or in bank or on deposit, things in action, credits, stocks, bonds, securities, shares of stock, notes or bills receivable, muniments of title, as well as all other property of every character and description whatsoever of the defendant; and it is further

Ordered, Adjudged and Decreed that the said permanent receiver shall have each and all of the powers heretofore vested in him as temporary receiver herein by the said decree of October 2, 1923; and it is further

Ordered, Adjudged and Decreed that said receiver is hereby authorized to continue the business of the defendant as provided in the said decree of October 2nd until February 1st, 1924, unless the said receiver, in his discretion, shall determine to cease the continuance of such business prior thereto; and it is further

Ordered, Adjudged and Decreed that the bond of the said tem-
[fol. 40] porary receiver in the sum of $30,000 heretofore filed be and the same is hereby continued as the bond of the said permanent receiver.

Dated, New York, January 9, 1924.

Learned Hand, U. S. D. J.

Consented to: Rose & Paskus, Solicitors for Defendant. Feiner, Maass & Skutch, Solicitors for Oliver W. Birkhead, as Chairman of Creditors' Committee. Rosenberg & Ball, Solicitors for Complainant and Receiver.

IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS TO REPORT OF SPECIAL MASTER

Leo A. Price, as receiver of J. M. Gidding & Co., Inc., by Rosenberg & Ball, his solicitors, respectfully takes the following exceptions [fol. 41] to the report of the Hon. Wallace Macfarlane, Special Master, filed in the office of the Clerk of this Court on October 15, 1924.

The receiver excepts to the conclusion of the Master:

(a) That the claim of the United States for income taxes for the year 1920 is entitled to priority in payment from the assets of the defendant;

(b) That the claim of the United States for duties is entitled to priority in payment from the assets of the defendant;

(c) To the failure of the Master to find that the United States is only a general creditor of the defendant in the sum of $14,480.98 for income taxes;

(d) To the failure of the Master to find that the United States of America is only a general creditor of the defendant for duties in the sum of $1,086.70;

(e) To the failure of the Master to find that against the general claim of the United States of America for taxes in the said sum of $14,580.98, there is to be offset against any dividends payable upon that claim, the receiver's payment to the United States of America of $3,149.91.

Dated, New York, October 15, 1924.

Rosenberg & Ball, Solicitors for Leo A. Price, Receiver, Office & P. O. Address, #74 Broadway, New York City.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL

To the United States District Court for the Southern District of New York:

Leo A. Price, as receiver of J. M. Gidding & Co., Inc., appointed in the above-entitled cause, respectfully shows that on October 16, 1924, an order was made in the United States District Court for the Southern District of New York, confirming the report of Wallace Macfarlane, Esq., Special Master, allowing the claim of the United States of America for income taxes for the year 1920 and its claim for duties as a priority claim to be paid out of the assets of the defendant.

The said Leo A. Price, as receiver aforesaid, the petitioner herein, deeming himself aggrieved by the said final decree, hereby appeals from said decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors filed herewith.

And your petitioner prays that he may be allowed an appeal in said cause and that a transcript of the record, proceedings and papers [fol. 43] upon which said final decree was made, duly authenticated, may be sent to the said Circuit Court of Appeals.

Dated, New York, October 16, 1924.

Rosenberg & Ball, Attorneys for Leo A. Price, as Receiver of J. M. Gidding & Co., Inc.

Office & P. O. Address, #74 Broadway, New York City.

It is ordered that the appeal, as above prayed for, be allowed.

Francis A. Winslow, D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Leo A. Price, as Receiver of J. M. Gidding & Co., Inc., by Rosenberg & Ball, his solicitors, assigns the following errors of the District Court upon his appeal to the Circuit Court of Appeals for the Second [fol. 44] Circuit from the order of the said District Court, dated October 16, 1924.

(1) The District Court erred in confirming the opinion of the Special Master allowing the claims of the United States of America as priority claims;

(2) The District Court erred in holding that the United States of America was entitled to priority in the payment of its said claims over the claims of the general creditors of the defendant corporation.

(3) The District Court erred in directing the receiver herein to pay in full the claims of the United States of America in the respective sums of $11,331.07 and $1,086.70.

Dated, New York, October 16, 1924.

Rosenberg & Ball, Attorneys for Leo A. Price, as Receiver, Appellant.

O. & P. O. Address, #74 Broadway, Borough of Manhattan, New York City.

[fol. 45] CITATION—In usual form; omitted in printing

[fol. 46] In United States Circuit Court of Appeals for the Second Circuit

Charles H. Mears, Complainant,

against

J. M. Gidding & Co., Inc., Defendant

Leo A. Price, Receiver, Appellant,

against

United States of America, Appellee

Stipulation re Transcript of Record

It is Hereby Stipulated and Agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter, as agreed upon by the parties to this appeal.

Dated, New York, October 31, 1924.

Rosenberg & Ball, Solicitors for Appellant. Wm. Hayward, United States Attorney, Solicitor for Appellee.

[fol. 47] In United States District Court

Charles H. Mears, Complainant,

against

J. M. Gidding & Co., Inc., Defendant

Leo A. Price, Receiver, Appellant,

against

United States of America, Appellee

Clerk's Certificate

I, Alexander, Gilchrist, Jr., Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereto affixed at the City of New York in the Southern District of New York, this 31st day of October, in the year of Our Lord One Thousand Nine Hundred Twenty-four, and of the Independence of the United States the One Hundred Forty-ninth.

Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 48] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES H. MEARS, Complainant,

against

J. M. GIDDING & CO., INC., Defendant

LEO A. PRICE, as Receiver, Appellant,

against

UNITED STATES OF AMERICA, Appellee

Before Rogers, Manton, and Hand, Circuit Judges

Rosenberg & Ball, for Appellant, Leo A. Price, as Receiver, Godfrey Goldmark, of Counsel.

William Hayward, United States Attorney for the Southern District of New York, for Appellee; Thomas J. Crawford, Assistant U. S. Attorney; John Holley Clark, Jr., Assistant U. S. Attorney, of Counsel.

OPINION

This cause comes here from the United States District Court for the Southern District of New York.

PER CURIAM:

The only question presented for review by this Court is whether or not the Government of the United States is entitled to the prior [fol. 49] payment of its claim for income taxes and duties as priority claims in an equity receivership. The Special Master reported that the United States was entitled to priority of payment, and the District Court on October 16, 1924, entered an order confirming the Master's report. Thereupon the case was brought here on appeal.

The question thus raised is not different from that considered by this Court in Liberty Mutual Insurance Company v. Johnson Shipyards Corporation in which an opinion has this day been filed. In accordance with that opinion, and for the reasons therein stated,

The order is affirmed.

[fols. 50 & 51] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the Southern District of New York

JUDGMENT—Filed May 1, 1923

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R., M. T. M.

[File endorsement omitted.]

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 51 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Charles H. Mears, Plaintiff, against J. M. Gidding & Company, Inc., Defendant; Leo A. Price, as Receiver, etc., Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of May in the year of our Lord One Thousand Nine Hundred and twenty five and of the Independence of the said United States the One Hundred and forty ninth.

Wm. Parkin, Clerk. (Seal of the United States Circuit Court of Appeals, Second Circuit.)

[fol. 53] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
MAY 11 1925
WM. R. STANSBURY
CLERK

No. 1199 454

Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

LEO A. PRICE, as Receiver in Equity of J. M. Gidding & Co., Inc.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GODFREY GOLDMARK,
Counsel for Petitioner,
74 Broadway,
New York.

Supreme Court of the United States

LEO A. PRICE as Receiver in Equity of J. M. GIDDING & Co., INC., Petitioner, *against* UNITED STATES OF AMERICA, Respondent.	Notice of Application for Certiorari.

To HON. JAMES M. BECK, SOLICITOR GENERAL,
Washington, D. C.

PLEASE TAKE NOTICE that upon a certified copy of the transcript of the record herein and upon the annexed petition and brief thereto attached, the undersigned, on behalf of the above named petitioner, will present the annexed petition for a writ of certiorari to the Supreme Court of the United States at the Capitol in the City of Washington, D. C., on Monday, May 25, 1925, at the opening of court on that day or as soon thereafter as counsel can be heard, and will ask for the relief prayed for therein and for such other and further relief in the premises as may be just.

Yours respectfully,

GODFREY GOLDMARK,
Counsel for Petitioner,
No. 74 Broadway,
New York City.

Dated, May 9, 1925.

SUPREME COURT OF THE UNITED STATES.

LEO A. PRICE as Receiver in Equity of J. M. GIDDING & Co., INC., Petitioner, *against* UNITED STATES OF AMERICA, Respondent.	Petition for Writ of Certiorari to Circuit Court of Appeals for the Second Circuit.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Leo A. Price, as Receiver in Equity of J. M. Gidding & Co., Inc., respectfully shows:

I.

Nature of proceeding and decision below.

On October 2, 1923, Charles H. Mears, a resident of Pennsylvania and a creditor of J. M. Gidding & Co., Inc., a New York Corporation, filed his bill of complaint in the United States District Court for the Southern District of New York wherein he alleged that he was a creditor of the defendant in a sum in excess of $3,000; that the defendant was unable to pay its debts as they matured; that proceedings were threatened by various crediors; that the assets were subject to waste and that if a Receiver were appointed and such assets could be liquidated in the ordinary course of defendant's busi-

ness, they might largely exceed the liabilities. The defendant thereupon admitted the allegations of the bill and the court thereupon appointed a temporary receiver who continued the business for a period and eventually a permanent receiver of the defendant was appointed. Pursuant to an order for the filing of claims, the United States of America filed its claim for additional income taxes for the year 1920, and also a claim for additional duties on importations. The Master appointed by the Court allowed the claim as a priority claim for the sum of $11,331.07, and his decision was affirmed by the District Court for the Southern District of New York and by the Circuit Court of Appeals for the Second Circuit. In the latter Court this case was argued with the case of *Liberty Mutual Life Insurance Company* vs. *Johnson Shipyards Corporation.* On April 24, 1925, the Circuit Court of Appeals handed down its opinions in the two cases in which it held that although no priority arose by virtue of R. S. 3466, nevertheless the United States of America *had a sovereign right of priority for the payment of taxes in an equity receivership.* This decision was made despite the fact that the same Court theretofore held in the case of *Equitable Trust Company* vs. *Connecticut Brass Corporation,* 290 Fed., 712, that no such sovereign right of priority existed in case of ordinary contract debts.

II.

Important reasons why this Court should allow the writ.

Your petitioner is informed that since the decision by this Court in the *Metropolitan Street Railroad* case, 208 U. S., 90, the practice has become very common throughout the country to administer the affairs of large corpo-

rations and to effect their reorganization or distribute their assets through the medium of the equity receivership, a modern substitute for a judgment creditors' bill. Numerous suits of this kind involving both railroad public utility and industrial corporations are constantly being instituted.

The status of ordinary debts due the United States in proceedings other than in bankruptcy has been considered in numerous cases in this Court ever since the enactment of the Statute of 1797 (now R. S. 3466), and recently in *U. S.* vs. *Oklahoma* 261 U. S., 253 and in *Strain* vs. *Fidelity Guarantee Co.*, 264 U. S., 570. In all these cases it has been held that the Federal Government did not take over the sovereign right of priority of the Crown of England, but that the priority of this government for the payment of ordinary indebtedness was wholly dependent on Statutes passed by Congress in the exercise of its delegated powers. It was further held in this long line of cases that unless a debtor was divested of his property in one of the methods specified in R. S. 3466 or the earlier Act of 1797 no priority existed.

This Court, however, has never considered the grave question here presented; namely, *whether in the absence of Statute creating a priority for taxes due the United States in proceedings other than bankruptcy, the United States, a government of delegated powers (as distinguished from a sovereign State) has inherited the prerogative right of priority of the Crown of England.*

Stated in another way the question is whether a sovereign right of priority for Federal taxes exists as against other creditors of a corporation where the corporate assets are distributed in a judgment creditors suit in which the debtor has not been divested of its property as provided in R. S. 3466, and where there is no prior lien for taxes because of failure to comply with the provisions of R. S. 3186.

Your petitioner is informed that in many cases of this character—an equity receivership—very large claims of the United States for taxes are being presented, such claims in most instances arising from an audit of the books of the corporation following the appointment of the Receiver. In no case, other than the case at bar and its companion case of *Liberty Mutual Life Insurance Company* vs. *Johnson Shipyards Corporation,* has the status of such tax claims been considered.

Your petitioner admits that Congress has the power to create a priority for such tax claims but your petitioner asserts that no such priorty in fact has been created where a debtor is divested of its property by judgment creditor's suit.

To the end that the status of Federal tax claims in equity receiverships may be definitely determined, both for the guidance of Receivers throughout the country and for Government officials, your petitioner asks for the granting of a writ herein.

WHEREFORE, because of the gravity and importance of the question presented, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, requiring them to certify and send to this Court a transcript of the record of the proceedings in this case, to the end that the decree of said Court may be reviewed, and that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

LEO A. PRICE,
As Receiver in Equity of
J. M. Gidding & Co., Inc.

STATE OF NEW YORK, }
County of New York, } ss.:

LEO A. PRICE, being duly sworn, deposes and says as follows:

I am the Receiver in Equity of J. M. Gidding & Co., Inc. I have read the foregoing petition and the same is true to the best of my knowledge, information and belief.

LEO A. PRICE.

Sworn to before me this
8th day of May, 1925.

JOHN E. McGUIRK,
Notary Public, Bronx Co.
Certificate filed N. Y. Co.

CERTIFICATE OF COUNSEL.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

GODFREY GOLDMARK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

LEO A. PRICE as Receiver in Equity of J. M. GIDDING & Co., INC.,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Question Presented.

The question presented is whether the United States of America is entitled to priority in the payment of its claim for taxes in a creditors' suit brought for the purposes of conserving, marshalling and distributing the assets of a corporation in which it is conceded that the debtor has not been divested of its property in one of the methods specified in R. S. 3466 and where there is no lien under R. S. 3186. The petitioner does not question the right of Congress to create such a priority in the exercise of its delegated powers. The petitioner's claim is that the right of priority is wholly statutory and that Congress has not in fact exercised its delegated powers under the facts of this case and accordingly that the award of priority by the Court was, in fact, nothing more than judicial legislation.

Applicable Statutes.

The only statutes which have application are the following:

R. S. 3466.

Section 3466 of the Revised Statutes (Compiled Statutes, Sec. 6372), provides as follows:

> "Priority established. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

R. S. 3186.

Section 3186 of the Revised Statutes as amended in 1913 (Compiled Stat., Section 5908), provides as follows:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person; *Provided, however, that such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor* until notice of such lien shall be filed by the collector in the office of the clerk of the District Court of the District within which the property subject to such lien is situated; Provided, further, whenever any State by appropriate legislation authorizes the filing of such notice in the office of the registrar or recorder of deeds of the Counties of that State, or in the State of Louisiana in the parishes thereof, then such lien shall not be valid in that State as against any mortgagee, pur-

chaser, or judgment creditor, until such notice shall be filed in the office of the registrar or recorder of deeds of the county or counties, or parish or parishes in the State of Louisiana, within which the property subject to the lien is situated."

Brief of the Argument.

I.

Sovereign priority in England under the common law was based on the principle that when the rights of the Crown and the rights of a subject against a common debtor were concurrent, the rights of the Crown prevailed, whether the Crown's claim was for taxes or for other form of indebtedness.

Marshall vs. *N. Y.*, 254 U. S., 380;
Matter of Henley, 9 Ch. Div., 467;
Commissioners of Taxation for New South Wales vs. *Palmer*, 1907, Appeal cases 179.

II.

By an unbroken line of decisions for over a century, it has been held that the foregoing principle is not applicable in this country when the rights of the United States and a private citizen against a common debtor are concurrent. Under such circumstances, the rights of priority of the United States are those, and only those, created by Congress in the exercise of its delegated powers.

U. S. vs. *Oklahoma*, 261 U. S., 253;
U. S. vs. *Fisher*, 2 Cranch 358, 395;
U. S. vs. *Bank of North Carolina*, 6 Peters 29, 35;

U. S. vs. *Canal Bank*, 3 Story 79 (Federal case 14,715).

III.

The distinction between the nature of an obligation *ex contractu* and the obligation to pay a tax is immaterial to the question presented in the light of the basis of sovereign priority and the relationship between the State and the Federal Governments. As the priority of the Federal Government for a debt depends upon the exercise of a delegated power, so the priority for a tax must also depend upon the exercise of such delegated power.

IV.

If the dictum in the *Dollar Savings Bank* case, 19 Wallace, that so much of the royal prerogative as belongs to the king in his capacity as universal trustee enters as much into our political state as it does into the principles of the British Constitution, is the law, then the United States must now be held to have a sovereign prioriy for ordinary debts despite a century of decisions to the contrary.

U. S. vs. *Fisher*, 2 Cranch, 358, 395.

V.

Congress has by the Revised Statutes provided a comprehensive method for the collection of taxes and as the provisions of R. S. 3186 were not complied with in this case prior to receivership, the tax claim is entitled to no priority over general creditors.

Pusey-Jones Co. vs. *Hanssen*, 261 U. S., 491;
Metropolitan Street Railway Cases, 208, U. S., 90;
Marshall vs. *New York*, 254 U. S., 380;
Am. & British Securities Co. vs. *Am. & British Mfg. Co.*, 275, Fed., 121.

VI.

If a tax claim is a debt within the meaning of R. S. 3466 then the government is not entitled to priority because the debtor has not been divested of its property in one of the methods specified in that section.

Beaston vs. *Farmer's Bank*, 12 Peters 102, 136;
U. S. vs. *Oklahoma*, 261 U. S., 253;
Equitable Trust Co. vs. *Connecticut Brass Corporation*, 290, Fed., 712.

Argument.

POINT I.

Sovereign priority in England under the common law was based on the principle that when the rights of the crown and the rights of a subject against a common debtor were concurrent, the rights of the crown prevailed, whether the crown's claim was for taxes or for other form of indebtedness.

The prerogative of the crown of England had its origin in the common law maxim:

Quando jus domini regis et subditi concurrant, jus regis praeferri debet.

This principle was applied, as the authorities hereafter cited will show, in the cases of taxes, debts due by record, debts upon a specialty and ordinary debts. The only difference recognized in these classes of claims was one based upon the circumstances in which the priority attached, that is, the rights of the crown and a subject against a common debtor, had to be concurrent. If the creditor subject had a lien before the crown moved, then the claim of the subject prevailed.

A very good statement of the English procedure is found in *Middlesex Co.* vs. *State Bank,* 29 N. J., Eq., 268 (aff'd on opinion below, 30 N. J. Eq., 311) where the Vice-Chancellor said:

> "Anciently the king might, by his writ of protection, prevent any subject from suing his debtor until his debt was paid. By statute 25 Edw. III., ch. 19, its despotic rigor was so far mitigated as to allow the subject to obtain a judgment against the king's debtor, and, upon paying the king's debt, to have execution for both debts. But the prerogative has at all times been most loyally upheld by the English courts. It stands on a common law maxim: *Quando jus domini regis et subditi concurrant, jus regis praeferri debet.* Debts due the crown by record or upon specialty are entitled to preference over debts of the same class due to subjects, but simple contract debts due to the crown are not entitled to preference over debts of record due to subjects (Com. Dig., Title Administrator, ch. 2; Bac. Abr., title Execution, L 2; 2 Wms. on Ex'rs 991); but where both are simple contract debts that due to the crown must be preferred (Bac. Abr., title Executors L 2; 2 Wms. on Ex'rs 993).

The same historical facts may be found in the following cases:

State of Maryland vs. *The Bank*, 6 Gill & J., 205;

Matter of Devlin, 180 Fed., 170, 174, and cases cited.

American and English cases showing that prerogative right for debts and taxes was the same.

The authorities in England and here also indicate that the right to a priority in payment of a tax is bottomed upon precisely the same foundation. In fact, the only question seems to have been whether the prerogative right which existed with respect to taxes extended to ordinary debts.

In *Marshall* vs. *New York*, 254 U. S., 380, the question was as to the priority of the *State* with respect to its *claim for taxes*. This court showed that a State's priority for taxes emanated from the crown's priority for all *debts*. Justice Brandeis said at p. 382:

> "At common law the crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of a debtor's property of all debts due it. The priority was effective alike whether the property remained in the hands of the debtor, or had been placed in the possession of a third person, or was in *custodia legis*. The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right. *Giles* vs. *Grover*, 9 Bing., 128, 139, 157, 183; in *re Henley & Co.*, 9 Ch. D. 469, compare *United States* vs. *National Surety Co.*, decided by this court November 8, 1920, ante, 73."

In *Matter of Carnegie Trust Co.*, 206 N. Y., 390, at 397, the Court of Appeals in discussing a *State's* priority, said:

> "The king, therefore, and the prerogatives that

> were personal to him being repugnant to our Constitution are abrogated. But his sovereignty, powers, functions and duties, in so far as they pertain to civil government, now devolve upon the people of the state and consequently are not in conflict with any of the provisions of our Constitution. In as much, therefore, as the claims or moneys due the king, for the support and maintenance of the government, *whether derived from taxes or other sources of income,* were preferred over the claims of others, it follows that under the first sub-division of the provision of the Constitution of 1777, quoted, such preference became a part of the common law of our state, and is so continued under our present Constitution."

And in England the claim of priority for taxes also emanates from the same source.

In *Matter of Henley,* 9 Ch. Div., 467 (1878) a motion was made by Her Majesty's Commissioners for Inlands Revenue for a direction to the official liquidator of Henley & Co. to pay out of the assets of the company £56.5s in satisfaction of property and income *taxes* due from the corporation in respect of certain lands—the payment to be made in priority to the other claims against the company. The company was being wound up voluntarily by resolution and the winding up had been continued under the supervision of the court. The court held that the crown was not bound by the Winding Up Act and therefore could have issued its writ of extent, but it held further that this was not necessary and that the claim could be made by the Liquidator because of the crown's prerogative right to be preferred when its claim concurred with that of other creditors. Several opinions were written. BRETT, L. J., said:

> "There are two prerogatives of the crown bearing upon this question. The first is that the crown is not bound by a statute in which it is not specially mentioned. Therefore the crown is not bound by the Companies Act. It follows that **this**

being clearly a debt for which the crown can distrain, its power of distress is not taken away by the Act, and it can proceed to distrain in this case. It is, therefore, right that the **debt** should be paid in priority to the other creditors.

"But suppose we regard it merely as a simple contract debt; then in the administration of the assets of the company the crown comes into competition with the other simple contract creditors, and then the other prerogative to which I have alluded comes in, namely, that in competition with subjects, the right of the crown must prevail. Therefore in whichever way we look at the question, I think the crown ought to be paid this debt in priority."

And finally in *Commissioners of Taxation for the State of New South Wales* vs. *Palmer,* 1907, Appeal Cases 179, the question was whether in the administration of the assets of a bankrupt under the New South Wales Bankruptcy Act, the court should have allowed the claim of the crown for inland and income *taxes* as a preferential claim. The court below held that as the Bankruptcy Act gave no such priority, the claim was not preferred. The Privy Council of the House of Lords, however, reversed this decision, following the decision in the *Matter of Henley* above referred to, and held that from earliest times the King's debts were to be preferred when his title and that of his subjects concurred. The court said:

"In *Rex* vs. *Wells,* in a passage which has been often cited, MACDONALD, C. B., says: 'I take it to be an incontrovertible rule of law that where the King's and the subject's title concur the King's shall be preferred.' Except so far the Legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonably, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community. The rule is enunciated by LORD COKE in *Quick's*

> case. From Lord Coke's time to the present day it has never been questioned as a rule of law, and, so far as their Lordships are aware, there has never been any attempt on the part of any Court to limit the generality of its application except in the present case, and in two recent cases in the Colonies which will be referred to presently.
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> * * * * *

From the foregoing authorities it is submitted that it is entirely clear that any right for the prior payment of taxes has always been held to rest upon precisely the same principle as any prior right to the payment of ordinary debts, namely where the rights of Crown and subject concur the rights of the Crown prevail. It is also clear that in England a tax is deemed to be a debt in so far as the right of priority is involved.

POINT II.

By an unbroken line of decisions for over a century, it has been held that the foregoing principle is not applicable in this country when the rights of the United States and a private citizen against a common debtor are concurrent. Under such circumstances, the rights of priority of the United States are those, and only those, created by Congress in the exercise of its delegated powers.

The Constitution, Article 1, Section 8, provides as follows:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties,

imposts and excises shall be uniform throughout the United States."

And Clause 18 of the same article and section provides as follows:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

In *U. S.* vs. *Fisher,* 2 Cranch, 358,395, it was held that the power to create a priority for ordinary debts was a delegated power of the Federal Government, exercised in pursuance of the foregoing Clause 18. Chief Justice MARSHALL said:

> "If the act has attempted to give the United States a preference in the case before the court, it remains to inquire, whether the constitution obstructs its operation. To the general observations made on this subject, it will only be observed, that as the court can never be unmindful of the solemn duty imposed on the judicial department, when a claim is supported by an act which conflicts with the constitution, so the court can never be unmindful of its duty to obey laws which are authorized by that instrument. In the case at bar, the preference claimed by the United States is not prohibited; *but it has been truly said, that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.* It is claimed, under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States or in any department or officer thereof. In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained, that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various sys-

> tems might be adopted for that purpose, it might be said, with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution. The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object."

In *United States* vs. *Canal Bank*, 3 Story, 79 (Fed. case No. 14,715), Judge STORY, sitting in the Circuit Court, said:

> "It has long since been settled, by the solemn adjudications of the supreme court, that the United States do not possess any general right of priority or privilege over private creditors, for the satisfaction of the debts due to them, founded upon any general prerogative, belonging to the government in its sovereign capacity; but that all the priority or privilege, which the government is at liberty to assert, is or must be founded upon some statute, passed by Congress, in virtue of its constitutional authority. This was expressly so held in *U. S.* vs. *Fisher*, 2 Cranch (6 U. S.), 358, 396, and the doctrine has ever since been strictly adhered to. *U. S.* vs. *Hooe*, 3 Cranch (7 U. S.), 73; *Prince* vs. *Bartlett*, 8 Cranch (12 U. S.), 431; *Thelleson* vs. *Smith*, 2 Wheat (15 U. S.), 396; *U. S.* vs. *Howland*, 4 Wheat (17 U. S.), 108; *Conrad* vs. *Atlantic Inc. Co.*, 1 Pet. (26 U. S.), 387. It is not here, as it is in England, where the sovereign is entitled, in virtue of his prerogative, to a priority over private creditors, for satisfaction of the debts due to the crown. Com. Dig. 'Prerogative,' D. 86; id. 'Debt,' G. 8, G. 9."

The most recent enunciation of the foregoing principles is found in

U. S. vs. *Oklahoma*, 261 U. S., 253.

It is apparent therefore that unless the conceded distinction between a debt *ex contractu* and a tax obligation is the basis for the absence of a sovereign right of priority in one case and its presence in the other no right of priority exists.

POINT III.

The distinction between the nature of an obligation ex contractu and the obligation to pay a tax is immaterial to the question presented in the light of the basis of sovereign priority and the relationship between the State and the Federal Governments. As the priority of the Federal Government for a debt depends upon the exercise of a delegated power so the priority for a tax must also depend upon the exercise of such delegated power.

It is, of course, frankly conceded the nature of an obligation arising *ex contractu* is different from that arising for the payment of a tax. But this distinction while important for many purposes is not deemed important or decisive of the question presented here.

As has just been shown, the priority for taxes and debts in England rested on the same principle. As it has been held in an unbroken line of authority that the Federal Government did not inherit the prerogative of the crown and that the priority of the Federal Government is wholly dependent upon statutes passed by Congress in the exercise of its delegated powers it must follow that the *nature* of the indebtedness to the United States cannot of itself give rise to a sovereign priority. *Whether Con-*

gress creates a priority to make effective its express power to provide for the payment of debts of the Union, or to make effective its express power to lay and collect taxes, is immaterial. In either case, the priority is a creation of statute passed in pursuance of the power vested in Congress under Clause 18, *supra,* namely, the power to make all laws necessary and proper for carrying into execution the express powers vested in Congress by the Constitution.

POINT IV.

If the dictum in the Dollar Savings Bank case, 19 Wallace, 227, 239, that so much of the royal prerogative as belongs to the King in his capacity as universal trustee enters as much into our political state as it does into the principles of the British Constitution, is the law then the United States must now be held to have a sovereign priority for ordinary debts despite a century of decisions to the contrary.

In the *Equitable Trust* case, 290 Fed., 712, 717, involving priority for contract debts this dictum was urged upon the Court by the government. Judge ROGERS, speaking for the Circuit Court of Appeals, after quoting the dictum, said:

> "But that case did not involve the question now under consideration, and has never been understood, notwithstanding the generality of the language used, as intended to assert that the United States possesses a right at common law to priority of payment over other creditors. In that case the court was construing a statute which created a right and provided a particular remedy for its

> enforcement. All that was decided was that such a statute, by impliedly prohibiting other remedies than the one it gave, did not bind the government; it is not being named therein."

Nevertheless, in the present case, in its essence, the decision below is based upon this very dictum. If the Federal Government has inherited the prerogative of the King for the prior payment of taxes, there is nothing in our political system or in the Constitution which would not inevitably lead to the conclusion that the Federal Government also inherited the prerogative for the payment of debts, and yet, the decision in *United States* vs. *Fisher,* 2 Cranch, 358,395, is just to the contrary and the reasoning of that case has been followed ever since and as late as the decision in *United States* vs. *Oklahoma.*

If the United States has a sovereign priority for the payment of debts, then all the decisions for a period of 100 years have erroneously denied the United States its priority under varying circumstances.

The power of Congress to *create* a priority for taxes under all circumstances is not denied. The claim is that no such priority has been created where a debtor is divested of its property as the result of a creditor's suit, such as the one at bar.

POINT V.

Congress has by the Revised Statutes provided a comprehensive method for the collection of taxes and as the provisions of R. S. 3186 were not complied with in this case prior to the receivership, the tax claim is entitled to no priority over general creditors.

The present suit is a creditor's bill where the defendant

has waived the necessity of the obtaining of a judgment. Such a waiver is, however, merely procedural. The purposes of the suit are just the same as if there were a judgment:

Pusey & Jones Co. vs. *Hanssen*, 261 U. S., 491;
Metropolitan Street Railway cases, 208 U. S., 90.

Section 3186 of the Revised Statute, quoted at length above, provides that if a tax is not paid after demand, the amount shall become a lien from the time that the assessment list is received by the Collector, except that such lien shall not be valid as against mortgagees, purchasers and *judgment creditors*, until the lien is filed in the office of the District Court or in some state office designated by a state legislature.

In the present case the tax was not assessed until after the receiver was appointed and the property of the defendant had passed into the custody of the court. At the time of the filing of the bill, there was no lien. However, if the contention of the Government is sound, it must be held that if Mears, the plaintiff in this case, had obtained a judgment, had execution returned unsatisfied and had brought a judgment creditor's bill, the Government would have a priority over Mears' judgment, despite the fact that the provisions of 3186 had not been complied with. If it be true that the United States has such a priority, then the provisions of 3186 insofar as they protect the rights of judgment creditors, are wholly meaningless.

If numerous other creditors of the defendant corporation had instituted suits, obtained judgments and eventually brought judgment creditors' suits, their right of satisfying such judgment out of the assets of the defendant would have been superior to that of the Government, because of the latter's failure to comply with Section

3186. The fact that the suit was instituted by one creditor, Mears, on behalf of all, and the fact that a judgment was waived and the other creditors enjoined from proceeding to judgment, cannot increase the rights of the United States.

> See *American & British Securities Co.* vs. *American & British Manufacturing Co.*, 275 Fed., 121.

As appears from *Marshall* vs. *N. Y.*, 254 U. S., 380, at common law the priority of the Crown overreached an execution. The very purpose of R. S. 3186 as amended in 1913 was to change this rule and protect judgment creditors from unrecorded taxes.

POINT VI.

If a tax claim is a debt within the meaning of R. S. 3466, then the Government is not entitled to priority because the debtor has not been divested of its property in one of the methods specified in that section.

It is believed that the term "debts" as used in the Act of 1797, now R. S. 3466, was intended to include all forms of indebtedness which might be due to the United States, for as stated by this court in *United States* vs. *Chamberlain*, 219 U. S., 250, 262:

> "A tax may or may not be a 'debt' under a particular statute, according to the sense in which the word is found to be used."

If this conclusion is correct, then there is no priority,

because the debtor has not been divested of his property in the manner prescribed in that Section.

Beaston vs. *Farmers Bank*, 12 Peters, 102, 136;
U. S. vs. *Oklahoma*, 261 U. S., 253;
Strain vs. *U. S. Fidelity & Guarantee Co.*, 292 Fed., 294; aff'd 264 U. S., 570;
Equitable Trust Co. vs. *Connecticut Brass Corp.*, 290 Fed., 712.

Even if a tax is not a debt within the meaning of that section so that there is no priority for taxes where a debtor is not divested of its property in one of the methods there specified, nevertheless as said by Justice Brandeis in *Ebert* vs. *Poston*, 69 L. Ed., 215, 217:

> "A *casus omissus* does not justify judicial legislation."

If Congress believes that the administrative provisions of the taxing statute or the priority statutes should be amended, that is a legislative and not a judicial question.

POINT VII.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GODFREY GOLDMARK,
Counsel for Petitioner.

APPENDIX.

Opinions in Liberty Mutual Insurance Company Case upon the authority of which the decree below in this case was based.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff,
against
JOHNSON SHIPYARDS CORPORATION,
Defendant.

FRANK E. STRIPE and MAURICE P. DAVIDSON, as Receivers in Equity of Johnson Shipyards Corporation,
Appellants,
against
UNITED STATES OF AMERICA,
Appellee.

Before ROGERS, MANTON and HAND,
Circuit Judges.

ROTHWELL, HARPER & MATTHEWS,
For Appellants.

HAROLD HARPER,
Of Counsel.

WM. HAYWARD, United States Attorney for the Southern District of New York, for Appellee.

THOMAS J. CRAWFORD, Assistant U. S. Attorney.

JOHN HOLLEY CLARK, JR., Assistant U. S. Attorney,
Of Counsel.

These causes come here from the United States District Court for the Southern District of New York.

This action was begun as an ordinary conservation suit in equity and receivers of the defendant were appointed therein.

The United States filed claim with the receivers for income and excess profits taxes for the years 1917 to 1920, and also claimed to be entitled to priority of payment thereon.

The matter was referred to a Special Master, who reported that the defendant was indebted to the United States in the sum of $3,931.99 for taxes but denied that the United States was entitled to a priority in the payment thereof over general creditors.

No exceptions were taken to his report so far as the amount of the claim was concerned. But exceptions were taken to his denial of the right of the United States to priority of payment out of the assets of the estate.

The District Judge sustained the exceptions taken to the report, and awarded to the United States priority of payment in an order entered on August 4, 1924.

An appeal to this court was thereupon taken.

ROGERS, Circuit Judge.

The only question which this case raises is whether the United States, in an equity receivership suit, is entitled to priority of payment over the unsecured claims of general creditors, for its claim to income and excess profits taxes. In the court below the right of the United States to such priority, under the circumstances stated, was sustained.

The appellants in bringing the case into this court contend that the claim of the United States for taxes is merely a general claim against the estate, and that the United States is entitled only to share pro rata with the general creditors in obtaining the payment of a claim for taxes.

The Bankruptcy Act, sec. 64, providing for the settlement of estates in bankruptcy directs that there shall

first be paid "All taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality in advance of the payment of dividends to creditors." But that Statute has no application to the facts of this case, which is not a proceeding in the bankruptcy courts for the settlement of a bankrupt's estate.

And Section 3466 of the Revised Statutes provides as follows:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

This Section does not apply unless it appears that the debtor's property is insufficient to pay all his debts. *United States* vs. *State of Oklahoma*, 261 U. S., 253, 259, and unless in addition particular acts, required by the Section as evidencing such insolvency are shown. *Strain* vs. *United States Fidelity & Guaranty Co.*, 292 Fed., 694, aff'd by United States Supreme Court, 66 L. Ed., 387.

But Section 3466 relates only to the payment of "debts" and as we shall see taxes are not debts. Moreover we are not now dealing with an insolvent debtor, nor the estate of a deceased debtor, nor of a debtor who has made a voluntary assignment nor the estate of an absconding, concealed or absent debtor. So that Section 3466 clearly has no application to the pending case.

It is said that the question involved is controlled by the decision of this court in *Equitable Trust Company*

vs. *Connecticut Brass & Manufacturing Corporation*, 290 Fed., 712. The Government in that case had intervened in an equity suit similar in character to this one and asserted a claim approximately for $350,000 damages for conversion of copper supplied to the defendant under a contract for the manufacture of war munitions and also claimed priority of payment out of the assets in the hands of the receivers. The claim for priority was based on the provisions of Section 3466 of the Revised Statutes. This court denied the right to the priority on the ground that the right of the United States to priority in the payment of debts was statutory, and that Section 3466, which provided for the priority of payment of Government debts under prescribed conditions, had no application to the case of the distribution of the assets of an equity receivership. The court said:

> "We think the decisions of the Supreme Court, extending over a period of more than 100 years, have clearly established the law that the right of the United States to priority of payment is statutory, and does not apply while the debtor continues the owner of the property, even though he is unable to pay his debts. No evidence can be received of the insolvency of a living debtor until he has been divested of his property by making a voluntary assignment or has committed an act of bankruptcy, or his effects have been attached by process of law on the ground that he is an absconding, concealed, or absent debtor."

In that case we were dealing with the right of the United States to a priority in the payment of a debt due to it. We thought that whatever right to a priority the United States possessed, respecting the payment of debts, was statutory and did not exist independently of Statute. The subject has been regulated by Statute, so far as the Government of the United States is concerned, from the days of the First Congress to the present.

That the right of the United States to priority in the

payment of debts depends exclusively upon Statute seems to be established law from several decisions to which we shall briefly refer.

In *United States* vs. *Oklahoma,* 261 U. S., 253, 259, the court stated:

> "The claim of the United States to the asserted priority rests exclusively upon the statute."

In *United States* vs. *Fisher,* 2 Cranch, 358, 395, the court, speaking through Chief Justice MARSHALL in 1805, said:

> "In the case at bar, the preference claimed by the United States is not prohibited; but it has been truly said, that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised."

In that case the court held that in all cases of insolvency or bankruptcy of a debtor of the United States the Government was entiled to priority of payment. The question did not relate to the collection of a tax but to the right of the United States as the holder of a protested bill of exchange to a preference over general creditors where the debtor became a bankrupt. The right to priority of payment was rested upon an Act of Congress and not upon any doctrine of sovereignty.

In *United States* vs. *Bank of North Carolina,* 6 Peters, 29, 34, Mr. Justice STORY in 1832, writing for the court, said:

> "The right of priority of payment of debts due to the government is a prerogative of the crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts. The claim of the United States, however, does not

> stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal prerogative, may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms."

In *United States* vs. *Canal Bank*, 25 Fed. Cas., p. 277, 278, 3 Story, 79 Mr. Justice STORY, sitting in the Circuit Court in 1844, and after calling attention to the fact that several questions were involved, said:

> "In the first place, whether the United States have any priority, or privilege, in respect to the debts due to them by their debtors, over the debts due to private persons, so as to entitle them to a prior satisfaction, upon any judgments obtained against their debtors, out of the property attached, before other attaching creditors, whose attachments are of an earlier date. It has long since been settled, by the solemn adjudications of the Supreme Court, that the United States do not possess any general right of priority or privilege over private creditors, for the satisfaction of the debts due to them, founded upon any general prerogative, belonging to the government in its sovereign capacity; but that all the priority or privilege, which the government is at liberty to assert, is or must be founded upon some Statute, passed by Congress, in virtue of its constitutional authority. This was expressly so held in *United States* vs. *Fisher*, 2 Cranch (6 U. S.), 358, 396, and the doctrine has ever since been strictly adhered to. *United States* vs. *Hooe*, 3 Cranch (7 U. S.), 73; *Prince* vs. *Bartlett*, 8 Cranch (12 U. S.), 431; *Thelleson* vs. *Smith*, 2 Wheat (15 U. S.), 396; *United States* vs. *Howland*, 4 Wheat (17 U. S.), 108; *Conrad* vs. *Atlantic Ins. Co.*, 1 Pet. (26 U. S.), 387. It is not here, as it is in England, where the

> sovereign is entitled, in virtue of his prerogative, to a priority over private creditors, for satisfaction of the debts due to the crown, Com Dig. 'Prerogative,' D. 86; id. 'Debt,' G. 8, G. 9."

It is quite another question whether the United States is entitled to priority in enforcing the payment of a claim for taxes. If any such priority exists it plainly does not rest upon Statute for there is no legislation by Congress upon that subject and never has been any, except to create a lien, as hereinafter appears.

Before we proceed further with a consideration of the question presented it may be well to point out that a fundamental distinction exists between debts and taxes. They are two very distinct matters. A debt is not a tax and a tax is not a debt. Debts are due to the Government in its corporate capacity. Taxes are due to it in its sovereign capacity. A debt is a sum of money due upon contract, express or implied, or one which is evidenced by a judgment. Taxes are imposts levied by government for its support or for some special purpose which the government has recognized. *Meriwether* vs. *Garrett*, 102 U. S., 513, 514; *Lane County* vs. *Oregon*, 7 Wall., 71, 79.

In *Pierce* vs. *City of Boston*, 3 Met., 520, a Statute of Massachusetts allowed mutual debts to be set off and the defendant attempted to set off against a demand of the plaintiff certain taxes due to the city. The court did not regard taxes as debts.

In *City of Camden* vs. *Cullen*, 26 N. J. L., 398, the court said:

> "A tax, in its essential characteristics, is not a debt nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens, or subjects, for the support of the state. It is not founded on contract or agreement. It operates in invitum. A debt is a sum of money due by certain and express agreement. It orig

> inates in and is founded upon contract express or implied."

And see to the same effect *United States* vs. *Eggleston,* 4 Sawy., 199, 25 Fed, Cas. No. 15, 027; *Crabtree* vs. *Madden* 54 Fed., 426; *United States* vs. *McHatton,* 266 Fed., 602; *People* vs. *Dummer,* 274 Ill., 637, 643.

In *McCulloch* vs. *State of Maryland,* 4 Wheat., 316, 428, Chief Justice MARSHALL pointed out that the power to tax is essential to the very existence of government. "It is obvious," he said, "that it is an incident of sovereignty, and is co-extensive with that to which it is an incident."

In *United States* vs. *Bennett,* 232 U. S., 299, 306, Chief Justice WHITE, alluding to the limitations upon the power of the States to tax, says that they afford no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States "for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty."

And in the recent case of *Cook* vs. *Tait,* 265 U. S., 47, 56, the court quotes approvingly the statement made by Chief Justice WHITE in the case of *United States* vs. *Bennett, supra.*

In *Cooley on Taxation* (4th ed. vol. 1, sec., 57) that eminent authority said:

> "The power of taxation is an essential and an inherent attribute of sovereignty, belonging as a matter of right to every independent government. It is possessed by the Government without being expressly conferred by the people. The power is inherent in the people because the sustenance of the government requires contributions from them* * *. Constitutional provisions relating to the power of taxation do not operate as grants of the power of taxation to the Government, but instead merely constitute limitations upon a power

which would otherwise be practically without limit."

In Blackstone's Commentaries (Lewis's ed.), vol 3, page 160, note 37, it is said:

> "The authorities are overwhelmingly in favor of the conclusion, that taxes are not debts in the sense that they are liabilities arising out of contracts express or implied, and in the true sense are not debts at all, but are the enforced proportional contribution of each citizen and of his estate, levied by authority of the State, for all public needs; that they owe their existence to the action of the legislative power, and do not depend for their validity and enforcement upon the individual assent of the taxpayer, but operate in invitum."

Congress by the Act of July 13, 1866, ch. 184, Sec. 9, page 147, declared that "if any person * * * liable to pay a tax shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid * * *."

The Act of March 4, 1913, c. 166, 37 St.Pt.I, p. 1016, makes the lien run from the time when the assessment list is received by the Collector. And the Statute provides that the lien shall not be valid as against any mortgagee, purchaser or judgment creditor until notice of such lien shall be filed by the collector in the office of the district court of the district within which the property subject to such lien is situated.

It has frequently been pointed out that a tax lawfully imposed is not to be regarded as an ordinary debt, but is an obligation which is to be regarded as paramount to all other demands, although the law imposing the tax does not expressly provide that it is to have priority. These cases proceed upon the theory that the maintenance of the government and the public welfare are so dependent upon the collection of taxes that payment should have precedence over all other claims. And it is

thought that taxes levied for the support of government are founded upon a higher obligation than other demands. See *State of Minnesota* vs. *Central Trust Company,* 94 Fed., 244, 247, 248, and cases there cited.

The courts have sustained in numerous cases the right to priority of payment of taxes over all other claims. *State of Minnesota* vs. *Central Trust Co. of N. Y., supra, Burleigh* vs. *Chehalis County,* 75 Fed., 873; *George* vs. *St. Louis Cable & Western Ry Co.,* 44 Fed. 117; *Coy* vs. *Title Guarantee & Trust Co.,* 220 Fed. 90; *Davis* vs. *Pullen,* 277 Fed. 650; *Greeley* vs. *Provident Savings Bank,* 98 Mo. 458; *State* vs. *Rowse,* 49 Mo. 586; *Jack* vs. *Weiennett,* 115 Ill. 105; *State* vs. *Harris,* 17 So. Car. L. (2 Bailey) 598; *Butley* vs. *Bailey,* 2 Bay (S. C.) 244, 249. But these cases relate to the right of a State to priority of payment of a State tax, which is to be distinguished from the right of the United States to a similar priority, possibly in the fact that the States have a common law while it has often been said by the Supreme Court that the United States has no common law.

However, instances are numerous in which the common law prerogatives of the sovereign have been held applicable to the United States in its sovereign capacity. To a few of these we shall refer.

The prerogative of the Crown of England had its origin in a maxim of the common law:

> Quando jus domini regis et subditi concurrant,
> jus regis praeferri debet.

No suit or action could be brought against the King even in a civil action. 1 Blackstone's Com. 242. The same principle exists as respects the bringing of actions against the United States where no Act of Congress has provided otherwise.

In *United States* vs. *Clarke,* 8 Peters, 436, 444, Chief Justice MARSHALL in 1834 said:

> "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it."

And in *The Siren*, 7 Wall., 152, 154, the Supreme Court said in 1868:

> "It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress."

It is an ancient maxim of the common law *Nullum tempus occurrit regis*. It is a part of the prerogative of the sovereign. And Blackstone states that it is the standing maxim upon all occasions. 1 Commentaries 247. The same principle is applicable to the United States. The question was before the Supreme Court in *United States* vs. *Nashville, Chattanooga &c. Railway Company*, 118 U. S., 120, 125, where Mr. Justice GRAY said:

> "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or

> agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound. *Lindsey* vs. *Miller,* 6 Pet. 666; *United States* vs. *Knight,* 14 Pet. 301, 315; *Gibson* vs. *Chouteau,* 13 Wall, 92; *United States* vs. *Thompson,* 98 U. S., 486; *Fink* vs. *O'Neil,* 106 U. S., 272, 281."

A legislative act did not bind the King unless he was expressly named therein. Vol. 1, Blackstone's Com., p. 262.

In *Dollar Savings Bank* vs. *United States,* 19 Wallace, 227, 239, the Supreme Court said:

> "It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae,* or universal trustee, enters as much into our political state as it does into the principles of the British constitution."

The King (and any person suing to his use) shall neither pay nor receive costs. 3 Blackstone Commentaries 400. The privilege that he was not to pay costs was a part of his prerogative. In *United States* vs. *Hooe,* 3 Cranch 73, 92, the Supreme Court held in 1805 that costs could not be charged against the United States. And in 1817 in *United States* vs. *Barker,* 2 Wheat., 395,

rendered the decision of the Supreme Court the whole of which follows: "The United States never pay costs." And see *The Antelope,* 12 Wheat. 546; *United States* vs. *Ringgold,* 8 Peters, 150; *United States* vs. *Boyd,* 5 How., 29.

The principles laid down in the above cases are readily understood if the doctrine announced in *Dollar Savings Bank* vs. *United States, supra,* hereinbefore quoted is adhered to, viz., that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae* is as much a part of the national government as it is a part of the British constitution. Applying that principle to the facts herein involved we must sustain the right of the United States to priority of payment of the taxes.

The King and the prerogatives personal to him, being repugnant to the Constitution, are no doubt abrogated. However, the prerogatives he possessed in so far as they pertain to civil government and so far as they are not in conflict with the provisions of the Constitution survive and may be asserted by the United States. See *Matter of Carnegie Trust Co.,* 206 N. Y., 390, 397.

As this Court said in *Matter of Finkelstein,* 298 Fed., 11, 16, there is no doubt that the right of priority of the United States in the collection of taxes is an attribute of sovereignty.

We are of opinion that the United States, as a sovereign nation, is clothed with all the attributes of sovereignty except in so far as it is deprived of them by restrictions expresed in or which arise from the Constitution. And we think that independently of any specific statutory provision the United States in its capacity as a sovereign is entitled to a priority in the payment of taxes over unsecured creditors, such priority being possessed by it as a prerogative right. The United States being a Nation, its sovereignty extends to all persons within its boundaries and to the property of such persons even though such property is in the hands of an equity receivership.

Order Affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff,

against

JOHNSON SHIPYARDS CORPORATION,
Defendant.

FRANK E. STRIPE and MAURICE P. DAVIDSON, as receivers in equity of Johnson Shipyards Corporation,
Appellants,

against

UNITED STATES OF AMERICA,
Appellee.

Concurring Opinion of Hand, C. J.

HAND, Circuit Judge, (concurring): I agree with Judge Rogers' opinion except in one particular. It seems to me unnecessary to accept as authoritative what was said by Justice Strong, obiter, in *Dollar Savings Bank* vs. *United States*, 19 Wall., 227, 239, that is, that the United States has all the prerogatives of the British Crown, as *parens patriae*. A tax is an exaction imposed by the sovereign for its own purposes, which we should assume to be of an importance paramount to the rights of an individual. Besides it does not presuppose, like a debt, any voluntary acceptance of the hazard of the taxpayer's continued solvency. Perhaps it is easier to deduce the priority from such considerations than to establish it by prece-

dent. In any case the result does not appear to me to require us to accept as law the language cited, and I should think it quite possible that the implied prerogatives of a Republic against its citizens may not go so far. The prerogatives of the British Crown depend upon traditions and conceptions in some respects alien to those popular at the end of the eighteenth century and since. Whatever may be the final upshot, it seems to me unnecessary for the present to go further than the facts at bar, or to say more than the nature of a tax gives it, independently of statute, priority to debts due individuals, certainly to such as sound in contract, and these are all we have now to consider.

Office Supreme Court, U. S.
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CLERK

No. 454

Supreme Court of the United States

OCTOBER TERM, 1925.

LEO A. PRICE, as Receiver in Equity of J. M. Gidding & Co., Inc.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

GODFREY GOLDMARK,
Counsel for Petitioner,
74 Broadway,
New York.

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Supreme Court of the United States

LEO A. PRICE, as Receiver in Equity of J. M. Gidding & Co., Inc., Petitioner, *against* UNITED STATES OF AMERICA, Respondent.	No. 454

BRIEF FOR PETITIONER.

This case comes here upon a writ of *certiorari* issued to the Circuit Court of Appeals for the Second Circuit, which court affirmed a decree of the United States District Court for the Southern District of New York. The decree of the District Court in turn affirmed a report of the Special Master, who recommended that claims of the United States for income taxes and for duties which accrued prior to the appointment of an equity receiver were entitled to prior payment in the distribution of the corporate assets. The decision below, 6 Fed. (2d) 758, was based on the opinion in *Liberty Mutual Insurance Co.* vs. *Johnson Shipyards* reported in 6 Fed (2d) 752 and annexed to the petition for the writ of *certiorari* herein. That case is also here on *certiorari* under the title of *Stripe, Receiver,* vs. *United States.*

The Question Presented.

The question presented is whether income taxes and duties payable for a period prior to the appointment of the receiver in equity are entitled to payment before the

debts due ordinary creditors. Specifically, the questions are:

(1) Is a claim for taxes and duty an indebtedness or a "debt" within the meaning of Section 3466 of the Revised Statutes?

(2) If it is, such an indebtedness, is the United States entitled to priority therefor in an equity receivership? That is, has the debtor been divested of its property in one of the methods specified in Section 3466?

(3) If the claim for taxes and duties is not within the purview of Section 3466 or if Section 3466 does not give it priority in an equity receivership, has the United States nevertheless an inherent sovereign right of priority for the payment of taxes and duties?

Statement of Facts.

This is the usual suit brought by a common contract creditor against a corporation to conserve and marshal the corporate assets in which the obtaining of a judgment by the plaintiff is waived by the defendant corporation by admitting the allegations of the bill and consenting to the appointment of a receiver (R. fol. 25). In the present case upon the filing of the bill and answer, the court appointed only a temporary receiver on October 2, 1923, directing that notice be given to creditors for the purpose of determining whether the receivership should be continued (R., p. 19). The bill of complaint alleged that if the assets of the defendant could be liquidated in the usual and ordinary course of defendant's business, its assets would largely exceed its lawful obligations; that its quick assets nearly equalled its liabilities and that in addition it had slow assets of approximately $1,000,000. The temporary receiver was continued from time to time until January, 1924, when the receivership was made permanent (R., p. 19). In the intervening period, attempts at reorganization were made but these failed, and finally

the sale of the assets was directed (R., p. 6). The general creditors will receive between 30% and 40% of the amount of their respective claims (R., p. 7).

Pursuant to an order for the filing of claims, the United States of America filed a claim for additional income taxes for the year 1920 and also a claim for additional duties on importations made by the defendant before the receivership (R., p. 7). The details of these claims are accurately set forth in the Master's report (R., p. 1). The claim for taxes, as finally reduced, amounted to the sum of $15,112.47. There was an overpayment by the receiver of taxes for the year 1923, the details of which appear in the said report of the Master. From that report it is apparent that if the Government's claim for taxes is entitled to priority, it is to be allowed at the sum of $11,331.07, and that if it is not entitled to priority, it is to be allowed as a general claim at $14,480.98 and that no dividends are to be paid thereon until the receiver has been recouped for the full amount of the over-payment made by him, to wit, the sum of $3,149.91 (R., p. 3).

Applicable Provisions of the Constitution and of the Revised Statutes.

The Constitution.

The Constitution, Article 1, provides:

> "SECTION 1.—All Legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives."

Article 1, Section 8 of the Constitution provides:

> "The Congress shall have power to lay and collect *taxes*, duties, imposts and excises, to pay the *debts* and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

The Constitution, Article 1, Section 8, Clause 18, provides that Congress shall have power:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any Department or officer thereof."

Revised Statutes.

Section 3466 of the Revised Statutes (Compiled Statutes 1916, Section 6372) provides as follows:

> "Priority established. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3467 of the Revised Statutes (Compiled Statutes 1916, Section 6373) provides:

> "*Liability of executors, etc.*
>
> "Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

Section 3186 of the Revised Statutes (Compiled Stat., Section 5908), provides as follows:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person; Provided, however, that such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the clerk of the District Court of the District within which the property subject to such lien is situated; Provided, further, whenever any State by appropriate legislation authorizes the filing of such notice in the office of the registrar or recorder of deeds of the Counties of that State, or in the State of Louisiana in the parishes thereof, then such lien shall not be valid in that State as against any mortgagee, purchaser, or judgment creditor, until such notice shall be filed in the office of the registrar or recorder of deeds of the county or counties, or parish or parishes in the State of Louisiana, within which the property subject to the lien is situated."

Errors Relied Upon.

The errors relied upon are:

(1) That the court below erred in affirming the order of the District Court, affirming the report of the Special Master allowing the claim of the United States as a priority claim.

(2) That the court below erred in holding that the United States of America was entitled to prority in payment of its claim over the claim of general creditors of the defendant corporation.

Brief of Argument.

The petitioner contends:

(1)

At common law the Crown of Great Britain by virtue of prerogative right had a priority over all subjects for the payment out of a debtor's property of all claims due it, whether for ordinary debts or taxes. This prerogative right was based in both instances upon the principle that where the rights of the crown and a subject against a common debtor concurred, the rights of the Crown prevailed. In some states it has been held that this right devolved upon the people of the state and in other states the contrary conclusion has been reached.

(2)

The Federal Government never adopted the common law as the foundation of its jurisprudence and has no inherent sovereign right of priority for the payment of taxes or of ordinary debts. The decisions of this court from the earliest times are to the effect that the federal government did not inherit the prerogative right of the crown of England for the prior payment of debts and that the right of the United States to assert priority must be found in Federal statutes passed by Congress in the exercise of its delegated powers to pass all laws necessary to give effect to the express delegated power to pay debts.

(3)

The distinction between the nature of an obligation *ex contractu* and the obligation to pay a tax is immaterial to the question presented, in the light of the history and purpose of sovereign priority and in the light of the relationship between the people of the states and the Federal Government.

As the priority of the Federal Government for a debt depends upon the exercise of the delegated power to pass all laws necessary for carrying into execution the

express power *to pay debts*, so too the priority of the Federal Government for a tax must also depend upon the exercise of a like delegated power to pass all laws necessary for carrying into execution the express power *to levy and collect taxes and duties.*

(4)

Congress from the earliest times has recognized that the Federal Government has no sovereign right of priority with respect to the prior payment of any claim, and such priority was created, and executors and other trustees were made liable for a failure to recognize it, in the early revenue statutes which subsequently became Sections 3466, 3467 of the Revised Statutes. The history of those sections shows that they primarily were intended to secure a priority for public revenues *and those sections measure the priority for taxes.*

(5)

Section 3466 does not create a priority for ordinary debts or for taxes where the assets of a corporation are distributed in a judgment creditor's suit or equity receivership.

(6)

Congress has by the Revised Statutes provided a comprehensive method for the collection of taxes and has provided for a lien and distraint, and as the provisions of Revised Statutes 3186 *et seq.* as amended in 1913 were not complied with in this case prior to the receivership, a tax claim is not entitled to priority.

(7)

The Federal officials charged with the duty of collecting the internal revenue have always practically construed Sections 3466 and 3467 to include claims for taxes

and have heretofore always asserted the right to priority and the right to hold executors and trustees personally liable, solely because of the provisions of those sections.

The proof of claim in this very case bases the right of priority and the alleged obligation of the receiver upon the provisions of the Statute. This practical construction should not be disturbed, except for very cogent reasons.

POINT I.

At common law the crown of Great Britain by virtue of prerogative right had a priority over all subjects for the payment out of a debtor's property of all claims due it, whether for ordinary debts or taxes. This prerogative right was based in both instances upon the principle that where the rights of the crown and a subject against a common debtor concurred, the rights of the crown prevailed.

In some states it has been held that this right devolved upon the people of the state and in other states the contrary conclusion has been reached.

At common law, the right of the crown to the prior payment of obligations due it, whether such obligations were ordinary debts or duties or taxes, was predicated upon two distinct prerogatives. The *first*, that the crown was not bound by a statute, in which it is not specially mentioned and therefore might pursue its remedies under winding-up statutes which did not specifically refer to the crown's rights, and the *second*, that when the rights of the crown and of a subject against a common debtor concurred, the rights of the crown prevailed. Authorities both in England and in this country recognize no distinction in these prerogatives between claims arising

out of contractual obligations or out of unpaid taxes or other civil obligations. Both kinds of obligations are termed "debts." The leading English cases are the following:

Giles vs. *Grover*, 9 Bing. 128;
In re Henley & Co., 9 Chancery Div. 469;
Commissioners of Taxation for the State of New South Wales vs. *Palmer*, 1907 Appeal cases 179;
In re Webb & Co., L. R. 1922, Ch. Div. 369.

In this country some of the states have held that the principle of the common law with respect to sovereign priority has devolved upon the people of the state as an inherent right, whereas in other states it is denied that the common law principle has so devolved.

See collection of cases in *Equitable Trust Co.* vs. *Connecticut Brass Co.*, 290 Fed., 712, at 716.

One of the best statements of the English procedure is found in *Middlesex County* vs. *State Bank*, 29 N. J. Eq. 268, aff'd on opinion below, 30 N. J. Eq. 311.

The same historical facts may be found in the following cases:

State of Maryland vs. *The Bank*, 6 Gill & J., 205;
Matter of Devlin, 180 Fed., 170, 174, and cases cited.

In *Marshall* vs. *New York*, 254 U. S., 380, the case involving the priority of the State of New York *for taxes*, this court, in considering the nature of the crown's prerogative right for the prior payment of its taxes, considered them to be in the same category as debts, for this court said at page 382:

> "At common law the crown of Great Britain, by virtue of a prerogative right, had priority

> over all subjects for the payment out of a debtor's property of all debts due it. The priority was effective alike whether the property remained in the hands of the debtor, or had been placed in the possession of a third person, or was in *custodia legi*. The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right. *Giles* vs. *Grover*, 9 Bing. 128, 139, 157, 183; in *re Henley & Co.*, 9 Ch. D. 469, compare *United States* vs. *National Surety Co.*, decided by this court November 8, 1920, ante, 73."

And in *Matter of Carnegie Trust Company*, 151 App. Div., 606, affirmed 206 N. Y., 390, the New York Court of Appeals, in considering the inherent priority of the State of New York for its claim for *taxes*, held that the sovereign powers of the King, so far as they pertained to civil government, devolved upon the people of the State, and that, therefore, claims or moneys due the King for the support of the Government, whether derived from taxes or other sources, were preferred over the claims of others, and the Court of Appeals further held that this principle of the common law became a part of the common law of the State of New York, in pursuance of its constitutional provisions. The Court of Appeals said:

> "The king, therefore, and the prerogatives that were personal to him being repugnant to our Constitution are abrogated. But his sovereignty, powers, functions and duties, in so far as they pertain to civil government now devolve upon the people of the state and consequently are not in conflict with any of the provisions of our Constitution. In as much, therefore, as the claims or moneys due the king, for the support and maintenance of the government, *whether derived from taxes or other sources of income*, were preferred over the claims of others, it follows that under the first sub-division of the provision of the Con-

> stitution of 1777, quoted, such preference became a part of the common law of our state, and is so continued under our present Constitution."

The English cases above referred to *also* show that the prerogative right for the prior payment of taxes stood upon the same principle as the right for the prior payment of debts.

In *Matter of Henley,* 9 Ch. Div., 467 (1878), a motion was made by Her Majesty's Commissioners for Inland Revenue for a direction to the official liquidator of Henley & Co. to pay out of the assets of the company £56.5s in satisfaction of property and income *taxes* due from the corporation in respect of certain lands—the payment to be made in priority to the other claims against the company. The company was being wound up voluntarily by resolution and the winding up had been continued under the supervision of the court. The court held that the crown was not bound by the Winding Up Act and therefore could have issued its writ of extent, but it held further that this was not necessary and that the claim could be made by the Liquidator because of the crown's prerogative right to be preferred when its claim concurred with that of other creditors. Several opinions were written. BRETT, L. J., said:

> "There are two prerogatives of the crown bearing upon this question. The first is that the crown is not bound by a statute in which it is not specially mentioned. Therefore the crown is not bound by the Companies Act. It follows that **this being clearly a debt** for which the crown can distrain, its power of distress is not taken away by the Act, and it can proceed to distrain in this case. It is, therefore, right that the **debt** should be paid in priority to the other creditors.
>
> "But suppose we regard it merely as a simple contract debt; then in the administration of the assets of the company the crown comes into competition with the other simple contract creditors,

and then the other prerogative to which I have alluded comes in, namely, that in competition with subjects, the right of the crown must prevail. Therefore in whichever way we look at the question, I think the crown ought to be paid this debt in priority."

In *Commissioners of Taxation for the State of New South Wales* vs. *Palmer*, 1907, Appeal Cases 179, the question was whether in the administration of the assets of a bankrupt under the New South Wales Bankruptcy Act, the court should have allowed the claim of the crown for land and income *taxes* as a preferential claim. The court below held that as the Bankruptcy Act gave no such priority, the claim was not preferred. The Privy Council of the House of Lords, however, reversed this decision, following the decision in the *Matter of Henley* above referred to, and held that from earliest times the King's debts were to be preferred when his title and that of his subjects concurred. The court said:

"In *Rex* vs. *Wells*, in a passage which has been often cited, MACDONALD, C. B., says: 'I take it to be an incontrovertible rule of law that where the King's and the subject's title concur the King's shall be preferred.' Except so far the Legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonably, when it is considered that, after all, it *only means that the interests of individuals are to be postponed to the interests of the community.* The rule is enunciated by Lord COKE in *Quick's* case. From Lord Coke's time to the present day it has never been questioned as a rule of law, and, so far as their Lordships are aware, there has never been any attempt on the part of any Court to limit the generality of its application except in the present case, and in two recent cases in the Colonies which will be referred to presently.

* * * * * *

It can hardly be disputed that in the present case the rights of the Crown and the rights of

ordinary creditors or 'common persons' (as the phrase is in the old cases) do concur or come into competition. It is admitted that the Bankruptcy Act., 1898, does not bind the Crown. It would therefore seem, on principle, that in the administration of the assets under the direction of the Court it was the duty of the Court to give effect to the Crown's prerogative.

As regards authority both in England and Ireland, the highest Courts in the country, short of the House of Lords, have upheld the prerogative of the Crown. The judgment of the Court of Appeals in *In re Henley & Co.* seems to their Lordships, as it did to SIMPSON, *J.*, to be clear upon the point. The decision was rested upon two separate grounds and upon two distinct prerogatives. It was a case of winding up, not of bankruptcy. The property had not passed out of the Company. The Court therefore held that the Crown was still at liberty to pursue its extreme rights against the Company's property and was on that ground entitled to priority. But the Court also held that under the other and wider prerogative the claim of the Crown must prevail. 'If the matter,' said JAMES, *L. J.*, 'is treated as a matter solely of administration of assets under the direction of the Court I think it is also right. Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails. Whether, therefore, the **debt** is treated as a debt of record or of specialty or of simple contract, there being a right of priority in the Crown, it is right that the debts should be paid.'

* * * * * *

The attention of their Lordships was called to the case of *In Re Baynes*, which has already been mentioned, and a case in Ontario, *Clarkson* vs. *Attorney-General of Canada*, in both of which the right of the Crown to preferential payment out of assets being administered in bankruptcy was denied. Their Lordships have carefully considered those cases. With every respect to the Courts

> by which they were decided, their Lordships cannot help thinking that in both cases the learned judges have not sufficiently kept distinct the two prerogatives which formed separate grounds of decision in *In Re Henley & Co.* The judgments are devoted in a great measure to a consideration of the prerogative under which the Crown was entitled to peculiar remedies against the debtor and his property, and of the law and the authorities bearing upon it. The principle upon which that prerogative depends is not to be confounded with the principle invoked in the present case. The prerogative, the benefit of which the Crown is now claiming, depends, as explained by MACDONALD, *C. B.*, in *The King* vs. *Wells*, upon a principle 'perfectly distinct * * * and far more general, determining a preference in favor of the Crown in all cases and touching all rights of what kindsoever where the Crown's and the subject's right concur and so come into competition ' "

In *Matter of Webb*, L. R., 1922, Ch. Div., 276, the Court of Appeal expressed some doubt as to whether there were really two prerogatives as indicated in the foregoing cases and seemed to believe that the better view was that there was one prerogative, but two methods of enforcement.

Conclusions from Foregoing Authorities.

The foregoing authorities make it clear that the prerogative right of the crown of priority *parens patriae* for taxes and for all other forms of obligations to the crown are based upon the principle that where the rights of the crown and a subject against a common debtor concur, the rights of the crown prevailed. And it is further apparent that this rule of the common law was based upon the further principle that the interests of the individuals were to be postponed to the interests of the community. It also has been made to appear that in some of the states it has been held that these principles of the

common law devolved upon the people of the state, and that in others, just the contrary conclusion has been reached.

It now will be shown that the Federal Government has never adopted the common law principle and that from the earliest times, this court has held that the Federal Government, as distinguished from the people of the states, did not inherit the prerogative right of the crown for the prior payment of debts, and that the right of the United States to assert a priority must be found in statutes passed by Congress in the exercise of its delegated powers.

POINT II.

The Federal Government never adopted the common law as the foundation of its jurisprudence and has no inherent sovereign right of priority for the payment of taxes or of ordinary debts. The decisions of this Court from the earliest times are to the effect that the Federal Government did not inherit the prerogative right of the crown of England for the prior payment of debts and that the right of the United States to assert a priority must be found in Federal Statutes passed by Congress in the exercise of its delegated powers to pass all laws necessary to give effect to the express delegated power to pay debts.

As will be shown at greater length hereafter, by statutes passed in 1789, 1792 and 1797, immediately following the adoption of the Constitution Congress recognized the absence of *sovereign* prerogative right of priority and Congress passed acts *creating* priority, in the event

of insolvency of a debtor, *first* upon bonds given for customs duties, and bonds given by revenue agents, and later by the Act of 1797 upon indebtedness arising upon a bond "or otherwise."

In 1801, both the scope of these statutes and their constitutionality were before this court in *United States* vs. *Fisher*, 2 Cranch 358. This court held that the words "or otherwise" in the Act of 1797 extended the priority to all forms of indebtedness. The court also upheld the constitutionality of the Act of 1797, upon the ground that the preference claimed by the United States was not prohibited by the Constitution; that by the constitution Congress was granted the power "to pay the debts," and was also given the power to make all laws necessary and proper for the carrying into execution the foregoing power, and that, accordingly, in the exercise of its delegated powers, Congress had the right to provide a means which appears most eligible to carry out the express powers. This court, speaking through Chief Justice Marshall, said:

> "If the act has attempted to give the United States a preference in the case before the court, it remains to inquire, whether the constitution obstructs its operation. To the general observations made on this subject, it will only be observed, that as the court can never be unmindful of the solemn duty imposed on the judicial department, when a claim is supported by an act which conflicts with the constitution, so the court can never be unmindful of its duty to obey laws which are authorized by that instrument. In the case at bar, the preference claimed by the United States is not prohibited; *but it has been truly said, that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.* It is claimed, under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof. In construing this clause, it would be incorrect, and

> would produce endless difficulties, if the opinion should be maintained, that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said, with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution. *The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object.*"*

Since that decision, it has been the uniform holding of this court that the right of priority of the United States does not stand upon any sovereign prerogative, but is exclusively founded upon the provisions of the statute. In *United States* vs. *Bank of North Carolina*, 6 Peters, 29, 35, this court said:

> "The right of priority of payment of debts due to the Government is a prerogative of the crown well known to common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens, and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal prerogative, may be clearly traced in these statutes: and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms."

*The principle that Congress had the right to use the means which it found necessary or expedient to exercise its express power was of course more elaborately considered in the later case of *McCulloch* vs. *Maryland*.

In *United States* vs. *Canal Bank*, 3 Story, 79, Federal case #14,715, Judge STORY, sitting in the Circuit Court, thus summed up the prior decisions of this court:

> "It has long since been settled, by the solemn adjudications of the supreme court, that the United States do not possess any general right of priority or privilege over private creditors, for the satisfaction of the debts due to them, founded upon any general prerogative, belonging to the government in its sovereign capacity; but that all the priority or privilege, which the government is at liberty to assert, is or must be founded upon some statute, passed by Congress, in virtue of its constitutional authority. This was expressly so held in *U. S.* vs. *Fisher*, 2 Cranch (6 U. S.), 358, 396, and the doctrine has ever since been strictly adhered to. *U. S.* vs. *Hooe*, 3 Cranch (7 U. S.), 73; *Prince* vs. *Bartlett*, 8 Cranch (12 U. S.), 431; *Thelleson* vs. *Smith*, 2 Wheat. (15 U. S.), 396; *U. S.* vs. *Howland*, 4 Wheat. (17 U. S.), 108; *Conrad* vs. *Atlantic Ins. Co.*, 1 Pet. (26 U. S.), 387. It is not here, as it is in England, where the sovereign is entitled, in virtue of his prerogative, to a priority over private creditors, for satisfaction of the debts due to the crown. Com. Dig., 'Prerogative,' D. 86; id. 'Debt,' G. 8, G. 9."

The latest exposition of these principles is found in *United States* vs. *Oklahoma*, 261 U. S., 253.

Thus it appears that the principle is established that while the common law sovereign right of priority devolved in some states upon the people of the state, that this principle of the common law and this sovereign right did *not* devolve upon the Federal Government and that any claim of the latter for priority over the claims of ordinary citizens was founded solely upon statutes passed by Congress in the exercise of its delegated powers.

It is, of course, true that in none of the foregoing Federal cases was a claim for taxes or duties, as such, in-

volved, and because of this fact and because of an asserted distinction between taxes and ordinary debts, it has been held below that the Federal Government has inherited an inherent sovereign prerogative right of priority for the payments of its *taxes*, when its claim comes into competition with the claim of the ordinary citizen.

It now will be shown that there is no basis for this distinction.

POINT III.

The distinction between the nature of an obligation ex contractu and the obligation to pay a tax is immaterial to the question presented, in the light of the history and purpose of sovereign priority and in the light of the relationship between the people of the States and the Federal Government.

As the priority of the Federal Government for a debt depends upon the exercise of the delegated powers to pass all laws necessary for carrying into execution the express power to pay debts, so too the priority of the Federal Government for a tax must also depend upon the exercise of a like delegated power to pass all laws necessary for carrying into execution the express power to levy and collect taxes and duties.

It is, of course, conceded that the nature of an obligation arising *ex contractu* is different from that arising from the payment of a tax. In the language of this court in *Guarantee Title & Trust Co.* vs. *Title Guaranty & Surety Co.*, 224 U. S. 152, the one is a "personal convention" and the other a "civil obligation." Such a civil obligation is no doubt a *quasi* contractual obliga-

tion. But this distinction while important for many purposes, and in the construction of certain statutes is not deemed important or decisive of the question presented here.

As has just been shown, in all the authorities both in England and here, the priority of the crown and of the states for taxes and for debts rested on precisely the same principle, namely, that when the right of the sovereign or of the state and those of a subject or a citizen against a common debtor concurred, the sovereign or the state was to be preferred, so as to insure the public revenue. Whether those public revenues have their source in a *bond* given for the payment of duties as a conditions of the release of imported merchandise or have their source in an obligation to pay such duties or pay income or other taxes, can be of no importance. If the Federal Government, as has been held since 1801, has no sovereign priority for the prior payment of an obligation arising upon a bond for duties because the common law principle has not been inherited by the Federal Government and that Government as one of delegated powers must create a priority, then the same rule must obtain with respect to a claim for taxes, and a holding to the contrary must over-rule all the cases from *United States* vs. *Fisher* to *United States* vs. *Oklahoma*.

Article 1, Section 8 of the Constitution, grants to Congress *both* the power to lay and collect taxes and to pay the debts. The power to lay and collect taxes granted to Congress is no less a delegated power than a power to pay debts. Both are to be sure sovereign powers which inhere in the people, but it is the people who have delegated to the Federal Congress certain legislative powers, for, as stated in Article 1, Section 1 of the Constitution,

> "Legislative powers herein granted shall be vested in the Congress of the United States."

Thus the people have delegated to the Federal Congress

both the power to tax and to pay debts. Whether, therefore, Congress creates a priority to make effective its express power to provide for the payment of the debts of the Union (*U. S.* vs. *Fisher, supra*), or to make effective its express power to lay and collect taxes, is immaterial. The creation of a priority in either case is for the protection of public revenues. In either case the priority is a creation of statute passed in pursuance of the power vested in Congress under Section 8, Clause 18, namely, the power to make all laws necessary and proper for carrying into execution the express powers vested in Congress by the Constitution.

The court below laid stress upon the language of this court in *United States* vs. *Bennett*, 232 U. S., 299, 306 and *Cook* vs. *Taite*, 265 U. S., 47. The Court below said:

> "In *United States* vs. *Bennett*, 232 U. S., 299, 306, Chief Justice WHITE, alluding to the limitations upon the power of the States to tax, says that they afford no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States 'for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty.' "

But those cases, of course, were considering the *extent* of the *power* of Congress to tax and not the question whether Congress had *exercised* that power or any other power. They simply held what this court many times before had already held, namely, that the power of taxation granted by the people to Congress by the Constitution is in its very nature a sovereign power although delegated, and has no limitations, except those stated in the Constitution, and is, in fact, *co-extensive* with that of a sovereign power.

In *Dobbins* vs. *Erie County*, 16 *Peters*, 434, 446, Justice WAYNE said in discussing the taxing power of the State and of the Federal government:

> "Both are restrained upon this subject, by express prohibitions in the constitution; and the states, by such as are necessarily implied, when the exercise of the right by a state conflicts *with the perfect execution of another sovereign power, delegated to the United States;* that occurs when taxation by a state acts upon the instruments, emoluments and persons which the Untied States may use and employ as necessary and proper means to execute their sovereign powers. The government of the United States is supreme within its sphere of action. The means necessary and proper to carry into effect the powers in the consitution, are in congress. Taxation is a sovereign power in a state; but the collection of revenue by imposts upon imported goods, and the regulation of commerce are also sovereign powers in the United States."

To same effect,

> *Collector* vs. *Day*, 11 Wall, 113;
> *McCulloch* vs. *Maryland*, 4 Wheat., 315, 433.

In *McCray* vs. *United States*, 195 U. S., 27, 61, Mr. Justice WHITE says:

> "The right of Congress to tax *within its delegated power being unrestrained*, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid."

In *Martin* vs. *Hunter*, 1 Wheat., 304, 326, this Court says:

> "The government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."

The two cases referred to in the Court below cannot be

construed to hold that the Federal power of taxation is a power which would exist *independent of any constitutional grant,* and for that reason there would attach to it the sovereign right of priority of the British crown. It was largely the absence of the taxing power under the articles of Confederation that required the adoption of the Constitution. If the Federal Government has an inherent power to tax as a sovereign government, then it has a like power to pay its debts, and the inherent priority, if it exists in the one case, must exist in the other.

The power of Congress to *create* a priority is conceded. That Congress has exercised that power by Section 3466 of the Revised Statutes, where a debtor has been divested of his property by bankruptcy or general assignment, is conceded, but that such power has been exercised by Congress where a debtor's property is disposed of by judgment creditor's bill or by equity receivership, is denied. (See Point V, *infra*). Whether or not there should be such a priority in such a case is a legislative and not a judicial question.

Even if this court should believe that such a priority should exist, as stated by this Court in *Ebert* vs. *Postom,* 69 L. Ed., 215, 217:

> "A *casus omissus* does not justify judicial legislation."

The Dictum in the Dollar Savings Bank Case Inapplicable.

The decision below is largely based upon the dictum in the *Dollar Savings Bank* case, 19 Wallace, 227, 239, that so much of the royal prerogative as belonged to the King in his capacity as *parens patriae* or universal trustee, is as much a part of the national government as it is a part of the British constitution. Of course, if this dictum is sound, in so far as it applies to the sovereign

right of priority, then under our political system the conclusion must be inevitable, that the King's prerogative for the payment of *ordinary debts* is also a part of the national government and the decisions for a period of 100 years have erroneously denied the United States its priority under a variety of circumstances.

It is interesting to note that in *Equitable Trust Co.* vs. *Connecticut Brass*, 290 Fed., 712, the same Circuit Court of Appeals as decided the case at bar, held that the dictum was inapplicable when a priority was asserted for an ordinary debt. For in holding inapplicable the dictum of the *Dollar Savings Bank* case, Judge ROGERS, speaking of that case said:

> "But that case did not involve the question now under consideration, and has never been understood, notwithstanding the generality of the language used, as intended to assert that the United States possesses a right at common law to priority of payment over other creditors. In that case the court was construing a statute which created a right and provided a particular remedy for its enforcement. All that was decided was that such a statute, by impliedly prohibiting other remedies than the one it gave, did not bind the government: it not being named therein."

In *Matter of In Re Burrus*, 136 U. S., 586, the court at page 594 refers with approval to the opinion of Judge Betts in the Circuit Court on the question of the power of the court to exercise the common law function of *parens patriae*, and Judge Betts' opinion is appended to the report of the case. In that opinion at 136 U. S., p. 604, is an elaborate discussion of the subject. Judge BETTS there says:

> "Does this common law prerogative, in relation to infants, rest in the government of the United States, and has the Circuit Court competent authority to exercise it?
>
> "The argument bearing upon the first branch

of this inquiry assumes two propositions as its basis: (1), that the government of the United States is supreme over all subjects within its cognizance; and (2) that the common law of England is embodied with, and has become a measure and source of authority to, the national government, and is to be enforced in the Circuit Court, whenever persons competent to sue in those courts prosecute their rights therein. It is believed that neither of these propositions can be maintained, and certainly not in respect to the subject matter of this proceeding.

"Many of the powers of the general government are unquestionably supreme and exclusive, while others, especially those in relation to remedies afforded by its courts to private suitors, are only concurrent with similar powers possessed by the state governments. If the power in respect to parties competent to sue in the national federal courts could be supposed to exist in its absolute sense in the United States Government, its exercise has been modified and restricted by Congress in the 11th section of the act of September 24, 1789, which gives the Circuit Courts no more than a concurrent jurisdiction with the state courts, of suits of a civil nature, at common law. 2 Stat., 60.

"Nor again do all attributes of sovereignty devolve upon the national government. Whether considered as emanating directly from the people in their aggregate capacity, or as proceeding from the States, in their independent organization and character, the government of the Union is one of special powers, defined or necessarily implied in the terms of the grant. *McCullough* vs. *Maryland*, 4 Wheat., 407; 2 Story Const., Sec. 1907; *Rhode Island* vs. *Massachusetts*, 12 Pet., 657.

"Though the point has been labored with ability by a late jurist of eminence in this department of legal learning, to deduce from the circumstances attendant upon the establishment of this government, that the common law became embodied in it, as an efficient principle of its authority and action, (Du Ponceau on Jurisd., 85-90),

yet the doctrine has never been declared or sanctioned by our courts.

"So far as the decisions have gone, they tend to repudiate the principle *in toto*. *United States* vs. *Hudson*, 7 Cranch., 32; *United States* vs. *Coolidge*, 1 Wheat., 415.

"There is, accordingly, no sure foundation for the assumption that the federal government possesses common law prerogatives inherent in the sovereign, which can be exercised without authority of positive law. *Martin* vs. *Hunter*, 1 Wheat., 304, 329.

"If any common law prerogative in relation to the administration of justice can be proved to exist in the sovereignty of the United States, it must, upon the same principle, be endowed with all such prerogatives, and can, on the like authority, unless inhibited by positive law, award writs of mandamus, *quo warranto*, *ne exeat*, or mandates to citizens abroad to return home on pain of confiscation of their estates (Comyn's Dig. Prerogatives, D. 34, 35), or this writ of *habeas corpus;* they being all common law writs *ejusdem generis*.

"That such attributes or functions of sovereignty cannot be inherent in the United States government necessarily results from the character of the government and the objects of its constitution."

It is submitted, therefore, that the dictum in the *Dollar Savings Bank* case has no application to the question of sovereign priority.

And yet, in the present case, in its essence, the decision below is based upon this very dictum.

It is not apparent that there is anything in the nature of the prerogative right of sovereign priority which justifies the holding that the right of the King parens patriae devolved upon the Federal Government when a tax claim was asserted, but did not devolve when the claim was for a bond for duties.

It is to be noted in the *Carnegie Trust* case, 206 N. Y. 397, quoted above, the New York Court of Appeals held

that the right of the King, as Universal trustee, devolved *upon the people of the State,* and that in the court below, 151 App. Div., at 611, Judge Scott said:

> "Of course all the cases dealing with the right of the United States to a preference in payment are beside the mark, for the United States never adopted the common law as a foundation of its jurisprudence, and any right to a preference which it asserts must be found in statutory authority."

Other Alleged Federal Prerogatives Immaterial.

The fact that certain rights, exemptions and immunities of the King of England may now be asserted by the Federal Government, is not persuasive of the existence of a sovereign right of priority for the payment of either debts or taxes.

Thus the rule that neither the Federal nor a state government can be sued without its consent, does not indicate the presence of the sovereign priority. The principle of immunity from suit is based upon wholly different reasons. This immunity, as stated by this court, has been adopted as a part of the general doctrine of publicists, that the supreme power, wherever it may reside, shall not be compelled by process of courts of its own creation, to defend itself of assaults in those courts.

In *United States* vs. *Lee,* 106 U. S., 196, this court found it necessary to ascertain on what principle the exemption of the United States from suit is founded. The court said at page 206:

> "It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts."

The immunity from the liability for costs stands upon the same principle. So, too, the English doctrine that the King could do no wrong, can have no application to our form of Government. As this court said in *Langford*

vs. *United States,* 101, U. S. 431, in discussing this question:

> "We do not understand that either in reference to the government of the United States, or of the several states, or of any of their officers, the English maxim has an existence in this country."

If the reasoning of the court below is sound that the existence of these rights and immunities of the Federal Government are evidence of the fact that the Federal Government has taken over the prerogative right of priority, then it is hard to understand the reasoning which underlies the conclusion of this court, that such a priority has not been taken over for ordinary debts. Again, if the immunity from suit is persuasive of the existence of the priority, then it is hard to understand why some of the states have denied that the common law principle of priority has been taken over. All states are immune from suit, and yet, some recognize the priority and some do not.

POINT IV.

Congress from the earliest times has recognized that the Federal Government has no sovereign right of priority with respect to the prior payment of any claim, and such priority was created and executors and other trustees were made liable for a failure to recognize it in the early Revenue Statutes, which subsequently became Sections 3466, 3467 of the Revised Statutes. The history of those sections shows that they primarily were intended to secure priority for public revenues and those sections measure the priority for taxes.

The fundamental error of the court below lies in its

holding that a claim for duties or for taxes was not intended to be granted priority by the early revenue acts passed immediately after the formation of the Union, and that this is so, because the words "indebtedness" and "debts," as used in those acts, did not include a claim for duties and taxes, but only claims arising ex contractu. Having reached this erroneous conclusion, the courts concluded that Congress could not have intended that tax claims should have *no* priority, and as no statutory priority was created, there must be found some other method of providing for it, namely, an inherent prerogative right.

Of course even the omission of *any* priority for taxes in the revenue acts is not justification for judicial legislation.

It is believed that an examination of the early statutes, which are now Section 3466 *and* 3467 *of the Revised Statutes, in the light of their underlying purpose, will reveal* (1) *that they were intended by Congress primarily to secure the prior payment of revenue where the debtor was divested of his property in the methods provided and only later were extended to secure prior payment of all obligations to the United States, whatever their nature, and* (2) *were intended to impose a personal liability upon executors and trustees, in the event that the priority was ignored. This conclusion the courts below have refused to adopt, however, because of their narrow interpretation of the words "debts" and "indebtedness."*

Whether revenues are collected through the exaction of a bond or without such bond the purpose of the statute and its scope must be the same. *In either case the Statute measures the extent of the priority.*

As said by this court in *United States* vs. *Chamberlain,* 219 U. S., 250, 262:

"A tax may or may not be a debt under a parti-

cular statute, according to the sense in which the word is found to be used."

The History of Revised Statutes Sections 3466 and 3467.

1. The first priority statute was enacted shortly after the formation of the Union.

The Act of July 31, 1789 (1 Stat., 29), was entitled:

> "An Act to Regulate the collection of the duties imposed by law on the tonnage of ships or vessels and on goods, wares and merchandise imported into the United States."

Section 19 gave the importer the option to give a bond where the duty exceeded $50.00.

Section 21 provided for priority in the following language:

> "And be it further enacted, that where any bond for the payment of the duties shall not be satisfied on the day it became due, the collector shall prosecute for the recovery of the money due thereon, by action or suit at law, and in the proper court, having cognizance therein; and in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States on any such bonds shall be first satisfied."

2. The next act of importance is the Act of May 2, 1792 (1 Stat., 259). That Act was entitled:

> "An act for raising a farther sum of money for the protection of the frontiers and for other purposes therein mentioned."

The Act levied new duties and by Section 18 sureties on importers' bonds were subrogated to the Government's claim for priority.

3. The next act of importance was the Act of March 3, 1797 (1 Stat., 512). That Act was entitled:

"An Act to provide more effectually for the settlement of accounts between the United States and receivers of public money."

It is the first act to extend the priority to the case of a person other than a revenue officer or obligor upon a custom bond indebted to the United States.

Section 5 of the Act provided:

> "And be it further enacted, that where any revenue officer, *or other person* hereafter becoming indebted to the United States, by bond or *otherwise*, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

4. The next Act of importance is the Act of March 2, 1799.* This act was entitled "The Act to Regulate the Collection of Duties on import and tonnage," provided for revenue districts and prescribed the duties of collectors. Provision is made for priority upon bonds for the subrogation of sureties, and in addition, there is here found *for the first time*, the provisions for personal liability of executors and assignees which later became Section 3467 of the Revised Statutes.

Conclusions from Foregoing Acts.

From the foregoing acts, it is apparent that there were three classes of debtors of the United States:

(1) Debtors on credit for public dues, that is for import duties or for internal taxes;

*1 Stat., pp. 627, 676.

(2) Government officials who received public money, that is, revenue officers;

(3) Debtors on ordinary contractual or commercial transactions with the Government.

By the first act passed in 1789, priority was created for revenues accruing on bonds for duties. By the Act of 1792, a like priority was given to the sureties upon such bonds. Thus, as early as 1792, priority in the case of bonds for duties on imported merchandise was complete. As early as 1791 (1 Stat., 203), taxes were imposed on distilled spirits, which were to be secured by bond, and in 1794 (1 Stat., 387), duties were imposed on snuff and sugar, likewise to be secured by bond. No priority, however, was created by those acts to insure the collection of these duties. The collection of internal revenues was essential to the government at a time when foreign war was threatened, and, accordingly, in 1797 the Act of March 3rd, 1797, was passed (1 Stat., 505). That act provided that where any revenue officer or other person "hereafter became indebted to the United States by bond *or otherwise*," and such person was insolvent, the debt due the United States should first be satisfied, etc.

And by the Act of March 2, 1799, the priority was repeated and an additional provision made that every executor, administrator, assignee or other person who pays any debt due by the person or estate from whom or for which he acts, before satisfying debts due to the United States, should be personally liable therefor.

The construction of these Acts was first before this court in *United States* vs. *Fisher*, 2 Cranch., 358, and this court reached the conclusion that by the Act of 1797, through the use of the words "indebted upon a bond *or otherwise*," it was intended to grant a priority to the United States, upon any form of indebtedness which might arise, and that the priority was not *limited* to

claims upon revenue bonds or against revenue collectors. After pointing out the limitations in the earlier Acts, Chief Justice MARSHALL said at p. 392:

> "Such was the title of the United States to a preference in the payment of debts, previous to the passage of the act of 1797. It was limited to bonds for the payment of duties on *imported* goods, and on the tonnage of vessels. An *internal* revenue had been established, and extensive transactions had taken place; in the course of which, many persons had necessarily become indebted to the United States. But no attempt to give them a preference in the collection of such debts had been made."

Having in mind the purpose of these statutes, namely, assurance of the collection of internal revenue of the United States, it is hard to understand why the statute should be given a narrow construction. Not only did Congress provide for the priority in the Act of 1797, but so anxious was it to protect the revenue, that in the Act of 1799 it provided a personal liability upon the executor or other trustee, who failed to recognize the Government's priority.*

Absurd Result Flowing from Government's Contions.

If the argument of the Government in the present case is sound and these statutes were *not* intended to include income taxes and duties, because they are not secured by bond, then it must follow, of necessity, under the Provisions of the Act of 1799, now Section 3467 of the Revised Statutes, that an executor or assignee or other trustee who pays private debts of a *cestui* before he pays contractual *debts* due the United States, is *liable* for the amount remaining unpaid. But if he pays such private

*It also shows that *duties* as such and not merely bonds were within the purview of the act, for it provides: "That in all cases in which suits * * * shall be commenced for the *recovery of duties* * * * the person * * * may be held to special bail.

debts before paying *taxes* due the United States, there is *no* such personal liability, because none is provided for in the statute. That is, the result must be that there is no penalty for ignoring the higher form of obligation to the United States.

It is, of course, true that at the time of the enactment of these Revenue Acts and the provisions for the insuring of the collection of the internal revenue, that there was no income tax payable and that income taxes, apportioned between the states, were not passed until some later period. But if the underlying purpose of the Revenue Acts passed in 1797 and 1799 was to secure a priority first for revenues and finally for the indebtedness due from all persons, whether upon bond "or otherwise," then the mere fact that the internal revenue today is collected by direct tax, rather than by a bond evidencing indirect taxation, cannot result in the conclusion that the primary purpose of Congress in the enactment of these statutes, was not to grant a priority for internal revenue, however, it was imposed,—whether the obligation accrued out of the exaction of a bond or a quasi contractual debt, the duty of the citizen to pay.

The foregoing views find support in the decisions of this court.

In construing the early statutes, this court said in *United States* vs. *Bank of North Carolina*, 6 Peters, 29, 35:

> "The same policy which governed in the case of the royal prerogative, may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms."

It already has been shown that the royal prerogative was for taxes and for debts, and if the statute, as stated by this court, is not to have a narrow and strict construc-

tion, it is hard to see why, according to the "just import" of its terms, it can be said that the intention was not to include all forms of obligations to the Government. The limitations which this court has placed upon the statute, as hereinafter shown, are not upon the form of indebtedness which is entitled to priority, but upon the method by which the debtor has been divested of the control of the property and by which the property is distributed amongst his creditors.

The English cases, quoted above, clearly indicate that in construing the crown's inherent prerogative, the courts considered a tax to be a debt in the broad sense of the term and no different construction should be given to the statute in this country, which creates a priority where the debtor is divested of his property in certain specific ways. In other words, in those specific cases priority created by the statute is co-extensive with the inherent prerogative of the crown.

It is interesting to note that under the Bankruptcy Act of 1898, which grants a specific priority for taxes and grants no priority for ordinary debts due the United States (*Davis* vs. *Pringle*, decided in this court May 25, 1924), taxes are deemed to be debts for the purposes of determining whether sufficient amount of indebtedness exists to put the debtor into bankruptcy.

Kaw Boiler Works vs. *Schull*, 230 Fed., 587.

In State ex rel. vs. *Mississippi Valley Trust Co.*, 209 Mo., 472, the court, in a very able opinion, held that while it was not necessary to determine in that case whether taxes are technically a debt or not, they might properly be treated as such, for the purpose of allowance against the estates of deceased persons and for classification.

In *United States* vs. *Chamberlain*, 219 U. S. 250, it was held that an action in debt would lie to recover the amount of a stamp tax payable under the Revenue Act of 1898.

In *Miller* vs. *Robertson*, 69 L. Ed. 54, decided November 17, 1924, this court gave a broad construction to the meaning of the word "debt" in construing the "Trading with the Enemy Act." It held that there was no reason to restrict the word "debt" to a narrow meaning, and this court said at page 57:

> "The meaning of the word 'debt,' as used in many statutes, is not restricted to demands enforceable in the actions of debt. Lord Coke, referring to the Statute of Merten (A. D. 1235) said (Institutes vol. 2, page 89) Debitum signifieth not only debt, for which an action of debt doth lie, but here in this ancient act of Parliament, it signifieth generally any duty to be yielded or paid."

Lane vs. Oregon, and Merriweather vs. Garrett, are not authorities opposed to petitioner's contentions.

Two cases in this court are always cited in support of the conclusion that the words contained in Section 3466

> "whenever any person indebted to the United States is insolvent * * * the debts due the United States shall be first satisfied"

do not include obligations to pay "taxes and duties." These are:

> *Lane* vs. *Oregon*, 7 Wallace 71;
> *Merriweather* vs. *Garrett*, 102 U. S. 472, 513.

But those cases simply construe particular statutes. This court, as a result of such construction, concluded that in those particular statutes, the term "debt" was not intended to include a civil obligation. As stated in this court in the *Chamberlain* case (219 U. S. 250), the text of the statute under consideration in those cases "forbade the conclusion" that Congress intended to include taxes.

In the *Lane* case, a state statute directed the collection of taxes in coin and a federal statute provided that United States notes were receivable in payment of taxes, internal duties, excises, debts and demands due to the United States, and also provided that such notes should be lawful money and legal tender in the payment of all debts, public or private, within the United States. The sole question was whether the latter provision could be deemed to override the provision of the State statute requiring taxes to be paid in coin and whether Congress intended the word debts with reference to the payment of debts generally, to include State taxes. The court held that the power to tax not delegated to the Federal Government remained in the State, and that the taxing power was concurrent and that Congress could not direct the State in what currency its taxes should be collected and that the first clause of the Act, in referring to payments to the United States, *specifically* included taxes, and the second clause, referring to payment of debts generally, did not include taxes.

In *Merriweather* vs. *Garrett*, 102 U. S. 472, suit was brought by the holders of bonds of the City of Memphis, in which it was alleged that despite the fact that the bondholders had procured judgment and mandamus to aid in the collection of the amounts due, a large proportion of taxes which had been levied for prior years, remained uncollected, and in pursuance of certain acts of the Legislature of Tennessee, a receiver was prayed for to take charge of the assets of the city and that he be clothed with power to collect all outstanding indebtedness of every kind due to the city. Prior to the filing of the bill, the charter of the City had been repealed and the territory and inhabitants remanded to the Government of the state. This court held that the relief, insofar as it applied to the collection of taxes through a receiver, could not be granted. The basis for the decision was that taxes levied by authority of the Legislature could be altered, postponed or released at pleasure, and

that a repeal of the law under which a tax was levied, at any time before the tax was collected, put an end to the obligation, and that taxes being merely imposts of government, created and continued only by the will of the Legislature, had none of the elements of property which could be seized for a debt or attachment or other judicial process. (See 102 U. S. 513, 514).

In the course of the opinion, the court pointed out the obvious distinction between debts and taxes which was pertinent to the question before it, which, of course, is not denied, namely, taxes operated in *invitum* and are not founded upon true contract.

These cases have little relevancy to the question as to whether at the end of the eighteenth century, at the inception of this government, Congress intended to provide in insolvency proceedings a priority for all forms of internal revenue due the United States, whether then existing or thereafter imposed, in those particular instances where the debtor was divested of his property, as the statute provided.

In view of the foregoing, it is submitted that it must he held the Revenue Acts of 1797 and 1799, now Sections 3466 and 3467 of the Revised Statutes were intended to create a priority for all forms of internal revenue, whether represented by a bond for duties or imposts, or by a direct obligation to pay the tax imposed by statute, and were intended further to impose a personal liability upon the executor, assignee or other trustee, charged with the duty of the distribution of the insolvent's property, if distribution was made in violation of the provisions of the statute. *Those early statutes measure the extent of Federal priority.*

As pointed out above, if this is not so, then even today an executor, assignee or trustee who pays a private indebtedness of the insolvent before he pays taxes due, is under no personal liability, whereas such personal liability would exist if he failed first to pay ordinary contractual debts due the Federal Government.

It now will be shown, that in the case at bar, the debtor has *not* been divested of its property in any of the methods which the statute prescribes. Therefore, priority created by 3466 is inapplicable.

POINT V.

Section 3466 does not create a priority for ordinary debts or for taxes where the assets of a corporation are distributed in a judgment creditor's suit or equity receivership.

The recent cases in this court of *United States* vs. *Oklahoma,* 261 U. S., 253, and *Strain* vs. *United Fidelity & Guaranty Co.,* 66 L. Ed., 387, which granted a motion to affirm a decision of the Circuit Court of Appeals in 292 Fed., 294, reaffirm the following principles for the construction of Sec. 3466 already laid down in earlier cases:

(1) That section created priority only if the debtor is divested of its property in one of the methods specified in that section, namely, so far as here is applicable, by the making of a general assignment or by "an act in bankruptcy."

(2) That the fact that the debtor cannot pay all his debts in full is immaterial, provided the debtor is not divested of his property, as provided in the statute.

It remains to be shown, therefore, that the judgment creditor's suit or equity receivership did not divest the corporate defendant here of its property in one of the methods prescribed in the Statute.

As to the Nature of the Equity Receivership.

Judgment Creditors' bills are of ancient origin. Their primary purpose was to reach the property of a defendant debtor which could not be reached by the ordinary

process of execution, either because the property was intangible or because it had been transferred in fraud of creditors. The obtaining of a judgment and the exhaustion of legal remedies was a condition precedent to the maintenance of the bill. In the Federal courts, the obtaining of a judgment was necessary because the defendant was entitled to a trial by jury of the fact as to whether or not the indebtedness existed.

Re Metropolitan Ry. Receivership, 208, U. S. 90.

At first, the bill was filed on behalf of a single creditor and he sought to collect only his own indebtedness. Gradually, however, there evolved the procedure of filing a bill under which the rights of all creditors in the property of a corporation were determined, and the property distributed in accordance with the equities of the parties, and finally, it was held that where the defendant corporation admitted the allegation of the bill, it waived its right to trial by jury and waived the defense of an adequate remedy at law, and that, accordingly, under those circumstances, the Federal court of equity would have the right to appoint a receiver.*

The foregoing summary statement of the nature of the present cause finds support in the following cases:

Pa. Steel Co. vs. *N. Y. City Ry.,* 198 Fed. 721, 737;

Pusey Jones Co. vs. *Hanssen,* 261 U. S. 491;

Metropolitan St. Railway, Receivership, 208 U. S. 90;

Luhrig Colleries vs. *Interstate Coal, Etc., Co.,* 281 Fed. 265, affirmed 287 Fed. 711.

In the *Pennsylvania Steel Co.* case, *supra,* Judge Noyes characterizes the proceedings as "equitable levies in favor of all judgment creditors entitled to seize the defendant's property."

*But to sustain Federal jurisdiction the complainant's claim alone must exceed $3,000. *Lion Bonding Co.* vs. *Karatz,* 262 U. S., 77, 86.

The Present Suit is Not the Equivalent of a General Assignment.

In *Davis* vs. *Miller Link Lumber Co.*, 296 Fed. 649, there was a holding that a suit, such as this, was equivalent to a general assignment, and, therefore, that there was a priority in favor of the United States. There is no real basis for this holding. It is, in effect, nothing but judicial legislation. The distinctions between a general assignment and the present suit are obvious. The present suit is nothing but a judgment creditor's action. (*Pusey Jones* case, *supra*). It is a real law suit, with parties plaintiff and defendant. (*Metropolitan Street Railway Receivership, supra*). It is a form of action which was well recognized at the time of the early priority statutes. A general assignment, on the other hand, was also well recognized at that time. It is a voluntary transfer of the property of the debtor in trust for the benefit of his creditors. The debtor is divested of title to his property.

Laclede Bank vs. *Schuler*, 120 U. S. 511.

As said by Judge Lurton in *Vaccaro* vs. *Security Bank*, 103 Fed., 436, 439,

> "A general assignment is the voluntary act of a debtor, whereby he transfers his property to a trustee for the benefit of creditors. Its nature and characteristics were well understood. It is not enough to say that, if the same consequences ensue from the appointment of a receiver, the one act is the equivalent of the other in law."

In *Empire Metallic Bedstead Co.*, 98 Fed., 981, the Court said:

> "It is a deed or conveyance which the grantor makes voluntarily, or sometimes by compulsion, at the instance of a court of insolvency. A petition for the appointment of a receiver is not that proceeding which is universally recognized as an

assignment, and its 'equivalency' of result, if equivalency exists, is not important."

A receiver in equity is a mere custodian, an arm of the court, and takes no title to the corporate property.

Quincey Railroad vs. *Humphreys*, 145 U. S. 82, 98.

An assignee for the benefit of creditors gets title to the property of the assignor, wherever it is situated, and may proceed to collect that property in foreign jurisdictions. An equity receiver has no right to sue beyond the confines of the district for which he is appointed.

Great Western vs. *Harris*, 198 U. S. 561; *Lion Bonding Co.* vs. *Karatz*, 262 U. S. 77.

So strict has this court been in the construction of the statute, that it has held that unless the assignee transfers all the property to the debtor, the statute is inapplicable.

A consent to an equity receivership is *not* of necessity the surrender of all the corporate property. It is but the surrender of the property within the particular jurisdiction in which the suit has been filed. Attachments may be levied against property without the jurisdiction, because title thereto is still in the debtor.

Zacher vs. *Fidelity Trust, Etc. Co.*, 106 Fed., 593.

On no possible theory can it be held that the judgment creditor's suit is a voluntary assignment of the debtor's property.

The Admission of the Allegations of the Bill and the Consent to the Appointment of a receiver are not the commission of Acts of Bankruptcy within the meaning of Section 3466.

Whether the consent of the appointment of the re-

ceiver comes within the clause of R. S. 3466 "as well * * * as to cases in which an act of bankruptcy is committed," involves two questions:

(1) Has the defendant corporation committed an act of bankruptcy; and

(2) Even if it has, is the mere commission of an act of bankruptcy, not followed by any proceeding under a state insolvency law or a Federal bankruptcy act, sufficient to entitle the United States to a priority under Section 3466?

A.

The defendant has not committeed an Act of Bankruptcy within the Provisions of the Bankruptcy Act of 1898.

If an act of bankruptcy were committed under the bankruptcy act, it would of necessity under Section 3, have to be either a general assignment for the benefit of creditors, or

> "Being insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, a territory or of the United States."

(1) It already has been shown that the present suit is not a general assignment.

(2) The receiver was not appointed *because of insolvency.*

The bill of complaint alleged that the defendant was solvent (R., p. 14). The answer admits the allegations. The purpose of the bill was to conserve the assets. The court did not appoint a permanent receiver, but merely a temporary receiver (p. 17) until a meeting of creditors (p. 19) and from time to time the temporary receiver-

ship was continued until more than three months after the filing of the bill, during which period the business was continued and attempts made to reorganize (p. 6). Then only were the assets liquidated (p. 6). These facts fail to show that the receiver was appointed because of insolvency.

By Section 1, subdivision 1 (a) (15):

> "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property * * * shall not at a fair valuation be sufficient in amount to pay his debts."

There is no proof that this condition existed at the time of the filing of the bill or that the bill was filed *because* of this condition. This being so, the rulings of this Court of *United States* vs. *Oklahoma* and *Strain* vs. *United States* are conclusive to the effect that the receiver was not appointed because of insolvency. To the same effect are:

Matter of Spaulding, 139 Fed., 244;
Matter of Valentine Pohl Co., 224 Fed., 685;
Matter of William S. Butler & Co., 207 Fed., 705, certiorari denied 231 U. S., 752.

(3) The defendant has not, "*being insolvent*," applied for a receiver or a trustee for its property. The defendant did not apply for a receiver at all. It merely waived its right to have the suit brought by a judgment creditor. The fact that the defendant consented does not make the suit collusive or other than the ordinary law suit in which the defendant corporation is the defendant and not the plaintiff.

In re Metropolitan Railway Receivership, 208 U. S., 90.

This section of the Act was intended to cover cases where a plaintiff corporation instituted voluntary dissolution proceedings under State statutes or the like. There is also nothing to show that at the time the application was made, the defendant was in fact insolvent. (*United States* vs. *Oklahoma*).

B.

Even if the defendant did commit an Act of Bankruptcy under the 1898 Bankruptcy Act, the United States would not be entitled to priority, inasmuch as the defendant has not been divested of its property in any proceeding based upon the alleged act of bankruptcy.

While it is believed that it has been shown that no act of bankruptcy has been committed under the 1898 Act, it is nevertheless urged that even if such act of bankruptcy were committed, the mere commission of the act, not followed by a proceeding in bankruptcy based thereon, is insufficient to create the priority under Section 3466. Under Section 3467 there must be some assignee or Trustee who takes title to the assets and becomes Trustee for the United States. *Lewis* vs. *United States*, 92 U. S., 618, and cases *infra*. To make this entirely clear, it is necessary again to revert to the history of the Statute and its interpretation. The first Act of 1789 (1 Stat., 29), provided:

> "And in all cases of insolvency or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States on any such bonds shall be first satisfied."

It is clear that the words "cases of insolvency," as used in the original act, referred exclusively to cases arising in the insolvency or bankruptcy courts. In 1789, state insolvency and Poor Debtor Laws had been in effect and were well known, and the reference was to a

technical insolvency proceeding, under which the debtor was divested of his property.* This did not include general assignments or absconding debtors.

In 1792 the meaning of the term "insolvency" was extended, for the act provided:

> "That the cases of insolvency in the said 44th section mentioned shall be deemed *to extend as well* to cases in which a debtor not having sufficient property to pay all his or her debts shall have made a voluntary assignment thereof for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed or absent debtor shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed."

Here for the first time is found the explanatory clause, which is substantially identical with that found in the present statute.

The 1792 Act provided new cases in which there was was to be priority. That is, there was to be priority in cases of insolvency, to wit, "legal bankruptcy," and

> "As well to cases where the debtor made the voluntary assignment and the case in which there was the absconding, concealed or absent debtor whose property was attached."

It is clear that the term "legal bankruptcy" had the same significance as the original Act of 1789 and was intended to refer to an insolvency proceeding as such.

Thus in *United States* vs. *Hooe*, 3 Cranch, 73, 90, Chief Justice Marshall said:

> "The whole explanation relates to such a general divestment of property as would in fact be equivalent to insolvency in its *technical sense*."

*See examples in *Sturges* vs. *Crowinshield*, 4 Wheat., 125, and *Ogden* vs. *Saunders*, 12 Wheat., 212.

And in *Thelusson* vs. *Smith,* 2 Wheat., 396, 422, the court said:

> "There can be little doubt but that the word insolvency mentioned in the act of 1790, ch. 35, par. 45, and repeated in the act of 1797, ch. 74, par. 5, and of 1799, ch. 128, par. 65, means a legal insolvency, which, whenever it occurs, the right of preference arises to the United States, as well as in the other specified cases to which the acts of 1797 and 1799 have extended the cases of insolvency."

In *Conard* vs. *Nicoll,* 4 Peters, 291, it appears that Judge Washington in the Circuit Court, in considering the meaning of the phrase under consideration, after pointing out that the expression insolvency extended to general assignments and to cases of attachment, stated (at p. 308) that it also extended:

> "3d. To cases in which an act of legal bankruptcy shall have been committed; that is, as the construction of the proviso in connection with the enacting clause seems necessarily to require, to cases where the property is in the hands of assignees, not by voluntary assignment only, but by assignment made in virtue of any state bankrupt law, or (possibly) of any bankrupt law of the United States which might thereafter be passed. There must be an assignment, either voluntary or compulsory, or else there can be no assignee, to be made liable to the United States, under the enacting clause. *If a mere act of bankruptcy be sufficient* to give rise to the preference of the United States from the moment of its commission, where is the assignee who is first to satisfy the claims of the United States out of the estate of the debtor, under the penalty, stated, in the enacting clause, of satisfying it out of his own estate. If it be said, that when the assignment of the bankrupt's estate shall be made, the preference of the United States will relate back to the act of bankruptcy, so as to overreach intermediate *bona fide* securities given by the insolvent to creditors,

> I can only answer that the assumption is altogether gratuitous, and receives no countenance from any part of this or any other act on this subject."

In the Supreme Court, the judgment was affirmed, this court saying:

> "This cause has been submitted, without argument. It is, in all its leading features, both in the points of law which arose and the evidence given at the trial, so similar to the case of *Conard* vs. *Atlantic Insurance Company*, decided by this court at January term, 1828, 1 Pet. 386, that we do not think it necessary to enter into an examination of the principles on which the judge submitted the cause to the jury. They appear to us to be in perfect accordance with the opinion delivered in that case, on great deliberation; of the entire correctness of which, we do not entertain a doubt."

And see to same effect *U. S.* vs. *Clark*, 1 Paine, 620, Federal case #14,807.

In *Beaston* vs. *Farmers' Bank*, 12 Pet., 102, 118, this Court says:

> "In giving a construction to these statutes, this court has held, that they only apply to two general classes of cases, viz: a living insolvent, *having an assignee;* and a dead insolvent, represented by executors or administrators (*Conrad* vs. *Nicoll*, 4 Pet., 308); that the priority, as against living debtors only existed where the debtor had become actually and notoriously insolvent, and being unable to pay his debts, has made a voluntary assignment of all his property; or, having absconded, or absented himself, his property has been attached by process of law. See *United States* vs. *Hooe*, 3 Cranch., 73; 1 Pet., 439. The words bankruptcy, and insolvency, mentioned in the statutes, are used as synonymous terms; and must be understood to apply to cases of insolvency *specified by the legislature;* and to mean a

> legal and known insolvency, manifested by some notorious act of the debtor, pursuant to law (*Prince* vs. *Bartlett*, 8 Cranch., 431); or where, by operation of law, the property of the debtor is taken out of his hands to be distributed by others (*United States* vs. *Clark*, 1 Paine, 629; and see *Thelusson* vs. *Smith*, 2 Wheat., 396); or where the property is in the hands of assignees, not by voluntary assignment only, *but by assignment made in virtue of any state bankrupt law, or, possibly, of any bankrupt law of the United States, which might hereafter be passed. Conrad* vs. *Nicoll*, 4 Pet., 308. It is not a mere inability of the debtor to pay all his debts, but that inability must be manifested in one of the three modes pointed out in the explanatory clause of the section. 1 Pet., 439."

These cases make it clear that the amendment of 1792 simply extended the term "cases of insolvency" to two new cases, namely, general assignments and absconding debtors, and that the phrase "as to cases in which an act of legal bankruptcy shall be committed" was not a new case but merely a paraphrase of the original "cases of insolvency" which, as already shown, referred to a proceeding under a State or possibly future insolvency law.

It hardly needs argument to show that a judgment creditor's bill, even as extended to include the rights of creditors other than the original plaintiff,* is not a proceeding under an insolvency or bankruptcy act, but is the mere exercise of the inherent power of the Court of Chancery. Nowhere is this made clearer than in the opinion of Chief Justice Shaw in *Commonwealth* vs. *Phenix Bank*, 11 Metcalf, 129, where he said in a proceeding brought by a State against the bank under a state statute:

> "It has sometimes been said that this was a law providing a mode by which banks can be placed in a state of legal insolvency, or in other

*The "amount in controversy is still the amount of plaintiff's claim alone—*Karatz* case, 262 U. S., 77, 86.

words an insolvent law for banks. This seems to arise from too hasty a conclusion that, because things are alike in many respects, they are alike in all. The most that can be said of the act in this respect is, that it is like an insolvent law for banks, because it may so operate as to put an end to the further operation of the bank, in case of insolvency, distribute the whole of its funds amongst creditors and stockholders, and thus operate like a bankrupt law or insolvent law. * * * But it does not necessarily, and will not, perhaps, generally have this operation; and it differs from an insolvent law in this, that the object of the act is not to declare the bank insolvent or to effect any transfer or assignment of its property. It provides for a chancery proceeding by which a competent judicial tribunal is authorized to regulate the proceedings of a bank by an injunction, temporary or permanent, absolute or qualified, effecting all their proceedings, or some particular proceeding only, according to the exigencies and peculiarities of each particular case. * * * The power vested in the court has been exercised by a view to accomplish the object contemplated by the statute, according to the exigencies of each particular case, without regard to the consideration whether it would lead to the final termination of the affairs of the bank or not. Even when receivers are appointed, they are to be appointed as receivers in a proceeding directed to be conducted 'according to the course of chancery proceeding.' They are officers of the law, subject in all respects to the orders and directions of the court. The law requires no assignment to be made to them, either by the bank or by any authorized court or officer. In practice, none is usually made, and none has been made in this case. They are to take possession of the property and effects of the corporation, subject to the rules and orders of the court. Their power to sell and convert the property into money is not given them by statute, or by any assignment or transfer, but it depends wholly on the order of the court. The distribution of the proceeds among bill holders and other creditors, and the residue,

> if any, to stockholders—a feature so essential to every system of bankrupt or insolvent laws—is not provided by this statute, but results only from the orders and decrees of the court, regulated by those principles of equity which govern all courts in the disposition of funds directed to be administered according to the course of chancery proceedings. Although, therefore, the proceedings under this law, in their ultimate results, and in some states of facts, operate like an insolvent law for this class of corporations, that is not the declared or obvious purpose nor the necessary consequence of the law. And further, it is wanting in the most essential feature of an insolvent law, that of divesting the debtor of the property, and vesting it in some other person, and constituting the proceeds a trust fund for creditors, in which it is held that the United States, as *cestui que* trust have a priority for the payment of their whole debt. It is therefore not a case of legal bankruptcy or insolvency; for we believe these terms as used in this sense are synonymous within the construction of the United States St. of 1797, c. 774."

That the appointment of a receiver on a judgment creditor's bill is not a divesting of the debtor's title to all his property within the purview of the Act is also held in *Beaston* vs. *Farmers' Bank*, 12 Peters, 102. There receivers were appointed in a suit by the United States as a judgment creditor with authority to take possession of the property of a bank, to dispose of the same and to collect all debts. The court held that even if the receivers had taken possession, there would not have been a transfer and possession of the property of the bank within the meaning of the Act of 1797. The court said at 12 Peters, 102, 136:

> "We are next to inquire into the legal effect of the appointment of receivers by the Circuit Court. Without deciding whether a circuit court of the United States has authority, in a case like this, to appoint receivers with power to take possession

> of all the property of a debtor of the United States, it is sufficient to say in this case that it does not appear that the power conferred on the receivers was ever executed; *and if it had been, it would not have been a transfer and possession of the property of the Elkton Bank, within the meaning of the act of Congress, and, therefore, the priority could not have attached to the funds in their hands.*"

These cases all clearly indicate that the mere commission of an *act* which would be ground for the filing of a bankruptcy petition, is not sufficient to divest the debtor of his property or to create a priority, and accordingly, even if the consent to the equity receivership were an act of bankruptcy, so as to create the *right* to file a petition, it is not an *act* of bankruptcy within the meaning of the Act of 1797 or the successor act, Section 3466.

These cases also show that the Act of Bankruptcy referred to in 3466 refers exclusively to proceedings under a bankrupt or insolvent statute and that that section can have no application to the exercise by a Court of Chancery of its inherent powers under a judgment creditor's bill.

If it is an act of bankruptcy which would be a ground for the filing of a petition, and, therefore, would give rise to a priority for an ordinary debt under 3466, *the remarkable situation would be presented, that if a debtor was adjudged a bankrupt, ordinary debts due the United States would be entitled to no priority under the recent decision of this Court in Davis* vs. *Pringle,* 69 *L., Ed.,* 645, *but if the same debtor merely committed an act of bankruptcy and was not thereafter adjudged a bankrupt, there would be a priority.*

This construction of Section 3466, insofar as ordinary debts are concerned, will bring the provisions of that Section into harmony with the Bankruptcy Act of 1898 as construed in *Davis* vs. *Pringle.* That is to say, if a debtor of the United States merely commits an act of bankruptcy, which may be the ground of the filing of an

involuntary petition, there is no priority for ordinary debts, for the debtor has not been divested of title to his property. If, however, he commits an act of bankruptcy and goes into bankruptcy, then the provisions of the Bankruptcy Act must be applied and under *Davis* vs. *Pringle,* and there also would be no priority. If this were not so, as above pointed out, there would be priority for the United States if a mere act of bankruptcy were committed, but no priority if the debtor went into bankruptcy.

Of course, the situation with respect to taxes is somewhat different. That fact cannot change the conclusion that the phrase "act of bankruptcy" in 3466 means actually going into bankruptcy. With respect to taxes, the foregoing consideration would lead to this result. Where the debtor is indebted for taxes and merely commits an act of bankruptcy and does not go into bankruptcy, there is no priority, but if the act of bankruptcy is followed by an adjudication in bankruptcy, then by virtue of the provisions of Section 64 of the Bankruptcy Act, there would be a priority.

In this situation, it simply means that under existing statutes if the debtor has committed an act of bankruptcy and the Government seeks a priority for its taxes, it may obtain a lien on the assets pursuant to R. S., Section 3186.

Of course, it may well be doubted whether at the present time there should be any priority for taxes in an insolvency proceeding, *at the expense of the particular creditors* where the taxes were not assessed until after the filing of the petition.

As stated by Mr. Justice HOLMES in *Davis* vs. *Pringle* (69 L. Ed. at 647):

> "Public opinion as to the peculiar rights and preferences due to the sovereign has changed."

It may be that the same change in public opinion has occurred respecting taxes first found to be due after in-

solvency. Upon this question there is no doubt a difference of opinion. It is in any event a legislative question. Whether, therefore, the provisions of the bankruptcy law directing the prior payment of taxes should be extended to all kinds of proceedings is a question which must be left to the discretion of Congress.

It appears, therefore, that the defendant corporation was not divested of title to his property by the appointment of the equity receiver; that it did not make a voluntary assignment of its property and that it has not been thrown into bankruptcy or filed a voluntary petition, and, accordingly, there has been committed no "act of bankruptcy." This being so, no priority exists.

POINT VI.

Congress has by the Revised Statutes provided a comprehensive method for the collection of taxes and has provided for a lien and distraint, and as the provisions of Revised Statutes 3186 et seq. as amended in 1913 were not complied with in this case prior to the receivership, a tax claim is not entitled to priority.

In recognition of the fact that the sovereign priority did not devolve upon the Federal Government and that there was no right to issue the writ of extent, as in England,* Congress as a part of the income tax law passed immediately following the Civil War, provided for a lien for taxes after notice and demand, and in detail for the issuance of warrants and distraints. These provisions are now Sections 3186, *et. seq.*, of the Revised Statutes. These provisions, together with the priority created by Section 3466 in the specific cases therein indicated, were deemed sufficient to protect the public revenues. These *two statutes are the equivalent of the two common law prerogatives* (page 8, *supra*).

*Marshall vs. New York, 254 U. S., 380, 382, *supra*, p. 9.

By amendment to Section 3186 in 1913 (37 Stat. Part 1, p. 1016) the lien of the United States for taxes was declared not to be good as against subsequent purchasers, mortgagees or judgment creditors, unless filed as the statute directed (See Statute, page 5 *supra*).

In the present case the tax was not assessed until after the receiver was appointed and the property of the defendant had passed into the custody of the court. At the time of the filing of the bill, there was no lien. However, if the contention of the Government is sound, it must be held that if Mears, the plaintiff in this case, had obtained a judgment, had execution returned unsatisfied and had brought a judgment creditor's bill, the Government would have a priority over Mears' judgment, despite the fact that the provisions of 3186 had not been complied with. *If it be true that the United States has such a priority, then the provisions of 3186 insofar as they protect the rights of judgment creditors, are wholly meaningless.*

If numerous other creditors of the defendant corporation had instituted suits, obtained judgments and eventually brought judgment creditors' suits, their right of satisfying such judgment out of the assets of the defendant would have been superior to that of the Government, because of the latter's failure to comply with Section 3186. The government would have had no priority. The fact that the suit was instituted by one creditor, Mears, on behalf of all, and the fact that a judgment was waived and the other creditors enjoined from proceeding to judgment, cannot increase the rights of the United States.

See *American & British Securities Co.* vs. *American & British Manufacturing Co.*, 275 Fed., 121.

This suit is a mere equitable levy in favor of all creditors (*Pa. Steel Co.* vs. *N. Y. City Ry.*, 198 Fed., 721, 737,

supra), and they all have the same rights as they would have had if they were separate judgment creditors, namely the right to satisfy their claims ahead of the Government because the latter did not comply with Sec. 3186 as amended in 1913. As the two common law prerogatives are embodied in Section 3466 and Sections 3186 et seq., and as no priority exists under the terms of either, there can be no priority at all.

POINT VII.

The Federal officials charged with the duty of collecting the internal revenue have always practically construed Sections 3466 and 3467 to include claims for taxes and have heretofore always asserted the right to priority and the right to hold executors and trustees personally liable, solely because of the provisions of those sections. The proof of claim in this very case bases the right of priority and the alleged obligation of the receiver upon the provisions of the statute. This practical construction should not be disturbed, except for very cogent reasons.

There is not the slightest indication in the reported cases or elsewhere that the government officials have heretofore relied upon an inherent sovereign priority for the payment of taxes. The proof of claim filed in this very case (R., pp. 7 and 8) asserts that the priority is fully determined by Section 3466 of the Revised Statutes, and the proof of claim states further (R., p. 8):

> "That no security therefore is held by the United States and that there are no set-offs or counterclaims.

"That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being fully determined by Section 3466 of the Revised Statutes and Section 64 (a) of the Bankruptcy Act.

"And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

If these sections, as is now contended, have no relation to taxes, then there can be no personal liability of the receiver, as is indicated in the proof of claim.

An examination of proofs of claim for taxes filed in numerous other equity receiverships indicates that in all the Government bases its right to priority on the express provisions either of Section 3466 or on the Bankruptcy Act. It is only when it is argued that priority created by 3466 does not cover the case of a judgment creditor's bill, that the government abandons its claim that it is entitled to hold trustees personally liable by virtue of the statute, and falls back upon a supposed inherent priority, the existence of which never before has been asserted. This practical construction of the source of the Government's alleged rights and this interpretation of the statute by the executive department and by officials charged with the enforcement of the law, is entitled to great weight and is not to be disturbed, except for very cogent reasons.

Swendig vs. *Washington Council*, 265 U. S., 322, 331.

POINT VIII.

The decree appealed from should be reversed and a decree directed which shall adjudge that the claims of the United States for taxes and for duties are not entitled to priority; that the United States is a general creditor of the defendant and that the Receiver is entitled to retain as a setoff against all dividends heretofore or hereafter declared upon the Government's claims, dividends up to the sum of $3,149.91.

Respectfully submitted,

GODFREY GOLDMARK,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 454

LEO A. PRICE, AS RECEIVER IN EQUITY OF J. M. Gidding & Co., Inc., petitioner

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

PREVIOUS OPINIONS IN THE PRESENT CASE

The report of the Special Master appears at pages 1 to 3 of the record. The District Court affirmed the Special Master's report without opinion. The opinion of the Circuit Court of Appeals appears at page 24 of the record and is reported in 6 Fed. (2d) 758, under the name of *Charles H. Mears* v. *J. M. Gidding & Co., Inc.* It is based on that court's opinion in *Liberty Mut. Ins. Co.* v. *Johnson Shipyards Corporation,* 6 Fed. (2d) 752. The latter case is also in this Court, *sub nomine Stripe, Receiver,* v. *United States,* No. 496.

GROUNDS OF JURISDICTION

The jurisdiction of this Court was invoked by a writ of certiorari which, on June 1, 1925, was granted under Judicial Code § 240 (a) as amended by the Act of February 13, 1925, to review a final decree, entered on May 1, 1925 (R. 25), in an equity suit pending in the Southern District of New York, where the jurisdiction depended solely on diverse citizenship. The United States intervened in that suit, claiming priority of payment of income taxes and customs duties and the claims were allowed as prior claims.

THE QUESTION INVOLVED

The sole question involved is the correctness of the decision of the court below that as against *general creditors* the United States are entitled to priority of payment of their income taxes and customs duties in a consent receivership proceeding in equity.

STATEMENT

On or about October 2, 1923, one Mears filed his bill of complaint against the Gidding Company, on behalf of himself and all other creditors, alleging in substance that the Company was indebted to him upon its promissory note; that it was unable to meet its obligations as they matured; that if its assets could be liquidated in due course of business their value would exceed its obligations; that certain of its creditors had instituted suits against it; that unless its assets were protected against separate

legal proceedings they might not be sufficient to pay all of its debts; and that inequitable preferences might thereby result. Mears therefore prayed the court to administer the Company's assets and business, to appoint a receiver for that purpose, and to restrain the institution and prosecution of judicial or statutory proceedings against the Company, "save and except the filing of mechanics' or other statutory liens." (R. 13–16.)

The Company admitted the allegations of the bill and joined in its prayers (R. 17), and on the day the bill was filed the District Court appointed a temporary receiver, authorized him to continue the Company's business, and restrained all creditors from interfering with the receiver's possession and from instituting and prosecuting any actions or proceedings against the Company. (R. 17–19.) On January 9, 1924, the temporary receiver was made the permanent receiver. (R. 19–20.)

On May 15, 1924, the Commissioner of Internal Revenue notified the Company of the assessment of an additional tax on its income for its fiscal year ending January 31, 1920 (R. 9), and on June 24, 1924, the Collector of Internal Revenue gave notice of the assessment and demanded immediate payment of the tax (R. 10). The Collector also filed a claim for the tax with the receiver. (R. 7–8.) The Collector of Customs of the Port of New York also filed claims with the receiver for customs duties (R. 12–13), apparently on importations made prior to the receiver's appointment.

At the time that the receivership proceedings were instituted the last two installments of the Company's income tax for its fiscal year ending January 31, 1923, were unpaid (R. 4), but the receiver paid them after his appointment (R. 5), *thus recognizing his obligation fully to discharge a tax liability which had accrued prior to his appointment.*

The Company's assets have been liquidated by the receiver (R. 6), and general creditors will not receive more than 40 per cent of their claims (R. 7).

The Special Master (R. 1), the District Court (R. 21), and the Circuit Court of Appeals (R. 24), all held that the Government was entitled to priority of payment of the tax and customs duties as against general creditors.

The receiver contends that this decision was erroneous because (1) the United States have only statutory rights of priority; (2) the only possible statutory sources of priority are R. S. 3186 and R. S. 3466; and, finally, (3) the Government was entitled to no priority under the former statute because its provisions were not complied with prior to the receivership, and to none under the latter because the taxpayer was not divested of its property in one of the ways specified thereby.

THE STATUTES TO BE CONSIDERED

1. The Revenue Acts

A. The Revenue Act of 1918 (40 Stat. L. 1057)

SEC. 230. (a) That * * * there shall be levied, collected, and paid for each taxable year upon the

net income of every corporation a tax at the following rates: * * *

SEC. 239. * * * In cases where receivers * * * are operating the property or business of corporations, such receivers * * * shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers * * * shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

SEC. 250. * * * (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. * * *

If the amount already paid is less than that which should have been paid, the difference shall * * * be paid upon notice and demand by the collector.

(e) If any tax remains unpaid after the date when it is due and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due * * *.

SEC. 1305. That all administrative * * * provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act * * *.

B. The Revenue Act of 1921 (42 Stat. L. 227)

SEC. 250. * * * (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. * * *

If the amount already paid is less than that which should have been paid, the difference * * * (hereinafter called "deficiency"), together with interest thereon at the rate of one-half of 1 per centum per month from the time the tax was due * * * shall be paid upon notice and demand by the collector.

(d) * * * If upon examination of a return made under * * * the Revenue Act of 1918, or this Act, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days * * * in which to file an appeal * * *. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, * * * within ten days after notice and demand by the collector

as hereinafter provided * * *. *Provided,* That in cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing.

(e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount * * *.

SEC. 1300. That all administrative * * * provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act * * *.

2. The Revised Statutes

SEC. 3183. It shall be the duty of the collectors, or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated. * * *

SEC. 3184. Where it is not otherwise provided, the collector shall * * * within ten days after receiving any list of taxes from the Commissioner of Internal Revenue, give notice to each person liable to pay any taxes stated therein, * * *

stating the amount of such taxes and demanding payment thereof. If such person does not pay the taxes, within ten days after the service or the sending by mail of such notice, it shall be the duty of the collector * * * to collect the said taxes with a penalty of five per centum additional upon the amount of taxes, and interest at the rate of one per centum a month.

SEC. 3186. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, * * * upon all property and rights to property belonging to such person: *Provided, however,* That such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the clerk of the district court of the district within which the property subject to such lien is situated: *Provided, further,* That whenever any State by appropriate legislation authorizes the filing of such notice in the office of the registrar or recorder of deeds of the counties of that state, * * * then such lien shall not be valid in that State against any mortgagee, purchaser, or judgment creditor, until such notice shall be filed in the office of the registrar or recorder of deeds of the county or counties * * * within which the property subject to the lien is situated.

SEC. 3187. If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes * * * by distraint and sale, in the manner hereafter provided, of the goods, chattels, or effects, * * * of the person delinquent as aforesaid. * * *

SEC. 3196. When goods, chattels, or effects sufficient to satisfy the taxes imposed upon any person are not found by the collector or deputy collector, he is authorized to collect the same by seizure and sale of real estate.

SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

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ARGUMENT

Summary

I. By virtue of R. S. 3466 the Government is entitled to payment of its taxes in advance of the claims of general creditors in an equity receivership proceeding instituted with the defendant's consent.

II. The income tax involved in this case was entitled to priority of payment (A) by virtue of the provisions of the Revenue Acts by which it was levied and under which it was assessed, (B) by virtue of the provisions of R. S. 3186, and (C) because Congress having established an extra-judicial system for the collection of the internal revenue which was designed to insure, and which, in the absence of judicial interference will normally result in its prior payment, it is the plain duty of the courts either to permit that system to function or, in the alternative, to direct the payment of taxes in advance of the claims of general creditors.

III. Independently of statute, the United States were entitled to priority of payment of both the customs duties and the income tax involved in this case, because (A) priority of payment inheres in the very concept of a tax and (B) the right to priority of payment of taxes is an attribute of the sovereignty of the Government.

I

By virtue of R. S. 3466 the Government is entitled to payment of its taxes in advance of the claims of general creditors in an equity receivership proceeding instituted with the defendant's consent

If R. S. 3466 is applicable to equity receiverships, instituted with the consent of the debtor, the petitioner concedes that the Government is entitled to priority of payment of its taxes. However, the petitioner argues at great length that R. S. 3466 has no application to such a receivership. The applicability of R. S. 3466 to equity receiverships is the question submitted for adjudication in *United States* v. *Butterworth-Judson Corporation et al.*, No. 503, which has been fully argued orally and by briefs. Therefore, although the Government in this case, as in that, relies upon R. S. 3466, it is unnecessary in this brief to repeat the Government's argument in that case or to discuss the subtleties and refinements employed by the petitioner in this case to show the inapplicability of R. S. 3466 to consent receiverships. The Government submits that question upon its argument in the *Butterworth-Judson* case.

However, only the question of the applicability of R. S. 3466 to consent receiverships is common to this case and the *Butterworth-Judson* case. ***This case involves a tax. That case involves a debt. The Government contends in this case that without regard to R. S. 3466 it is entitled to priority of payment of its taxes.*** That is the proposition we shall endeavor to demonstrate in this brief.

II

The income tax involved in this case was entitled to priority of payment (A) by virtue of the provisions of the Revenue Acts by which it was levied and under which it was assessed, (B) by virtue of the provisions of R. S. 3186, and (C) because Congress having established an extra-judicial system for the collection of the internal revenue which was designed to insure, and which in the absence of judicial interference will normally result in, its prior payment, it is the plain duty of the courts either to permit that system to function or, in the alternative, to direct the payment of taxes in advance of the claims of general creditors

A

The income tax was entitled to priority of payment by virtue of the provisions of the Revenue Acts of 1918 and 1921

The Revenue Act of 1918 levied the income tax in question and ordained in absolute and unqualified terms that it should be paid (*supra,* p. 4). It was assessed under the provisions of Section 250 (b) of the Revenue Act of 1921 (*supra,* p. 6). Neither Act makes any exception in favor of corporations in receivership or grants them any special privileges. On the contrary, both Acts clearly manifest an intention that such corporations should, *to the extent of their financial capacity,* pay all taxes due the Government upon income which accrued prior to receivership as well as upon that which accrued subsequently. Each Act provides in Section 250 that as soon as practicable after a return is filed the Commissioner of Internal Revenue shall examine it and shall recompute the tax, and that if it exceeds that shown in the return the ex-

cess shall be paid upon notice and demand by the collector of internal revenue. If the additional tax is not so paid, then a penalty and interest are added, " except in the case of estates of insane, deceased, or insolvent persons " (*supra,* pp. 5, 7).

Thus, each Act contemplates the assessment of additional taxes against insolvent persons and relieves their estates only of the penalty and interest for which solvent persons are liable if the additional tax is not paid within ten days after demand. Congress must be deemed to have realized that the estates of insolvent corporations are frequently administered in equity receiverships, yet no distinction is drawn by either Act between additional taxes assessed and demanded before and those assessed and demanded after receivership proceedings are instituted, or between additional taxes on past income and those on current income.

If further evidence is required that Congress intended the provisions of the Revenue Acts to apply equally to all corporations, whether solvent or insolvent, whether in receivership or under the management of the corporate officers, it is to be found in those sections of the Revenue Acts (*supra,* p. 5) which require a receiver who is operating the property or business of a corporation to make returns for such corporation, and provide that any tax due thereon is to be collected " in the same manner as if collected from the corporation."

An analogous situation was presented in *Swarts* v. *Hammer,* 194 U. S. 441, where it was contended

that the Government's priority for taxes was limited by the Bankruptcy Act of 1898 to taxes "legally owing" at the time of adjudication and did not extend to taxes subsequently accruing. This Court said (p. 444):

> By Section seven of that act the title to all of the property of the bankrupt not declared to be exempt is vested in the trustee. By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should exempt it from its obligations to either. If Congress has the power to declare otherwise and wished to do so the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.

The Bankruptcy Act was therefore held to apply to current as well as to back taxes, although it mentioned specifically only the latter. Similar reasoning leads to the conclusion that Congress intended that corporations in receiverships should pay back, as well as current, taxes in full, whenever assessed and demanded, to the extent of their capacity to pay.

Furthermore, the Revenue Acts incorporate within themselves all applicable administrative pro-

visions of law for the collection of taxes, including the provisions of R. S. 3186 (*supra*, p. 8).

B

The income tax was entitled to priority of payment under R. S. 3186

That Section provides in substance that if any person fails to pay a tax after demand, the amount thereof shall be a lien upon all of his property from the time when the assessment list was received by the collector, but that the lien " shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed " as required by law.

Payment of the income tax involved in this case was demanded (R. 10). It was not paid. It is perfectly clear, therefore, that if receivership proceedings had not intervened the Government would have acquired a lien upon all the property of the Gidding Company which would have been valid against its general creditors. It seems equally clear that the appointment of a receiver can not render the Government impotent to assess or to demand the payment of taxes. But if the Government can demand the payment of a tax, it can also acquire a lien therefor in spite of a receivership, for the result of a demand followed by failure to pay is prescribed by statute. It can not be proscribed by the courts.

Whenever the statutory conditions precedent of demand and failure to pay have been met, the statu-

tory lien arises inevitably and automatically. If that is not so, the statute furnishes the Government with a sword which must remain sheathed when most urgently needed to protect the public revenue.

Income taxes are assessed in the first instance upon the basis of the taxpayer's return. If he returns his entire net income, as it is his duty to do, an additional assessment is impossible. However, returns must be audited to determine their accuracy and, because of the vast number of returns, a considerable interval must necessarily elapse between the filing of a return and its audit. Not until the audit is made can an additional tax be assessed or its payment demanded. A large part of the public revenue results from additional assessments. The total internal revenue receipts for the fiscal years 1917 to 1925, inclusive, amounted to $29,560,952,689.56. Of that amount $2,811,258,170, or almost 10% was collected as the result of additional assessments. If the Government can not acquire a lien for the additional tax when assessed, it must assume every risk of adverse changes in the taxpayer's financial condition after the return is filed. The statute places no such risks upon the Government. It does not thus imperil the public revenue. It is perfectly specific in its enumeration of the hazards to which taxes are subjected. The Government runs the risk that before the tax is demanded the rights of purchasers, mortgagees, or judgment creditors will have intervened. It runs and can be made to run no other risk. The statute

does not force it into competition with the taxpayer's general creditors.

If, as the petitioner contends, the institution of receivership proceedings against a corporation between the filing and the audit of its return can prevent the Government from acquiring a lien for additional taxes, it is a simple matter for the corporation and its general creditors to reduce the Government to the status of a general creditor and a tax to the status of an ordinary debt merely by the collusive institution of such a proceeding. Receivership proceedings such as that involved in the case at bar are always collusive, at least in the sense that the defendant's consent is a prerequisite to the court's jurisdiction. *Re Metropolitan Railway Receivership,* 208 U. S. 90. If the petitioner correctly states the law, creditors, with their debtor's cooperation, by selecting an equity instead of a bankruptcy court to administer the assets of their insolvent corporate debtor, can easily defeat the Government's priority for its taxes.

The Government contends, however, that there is nothing in the nature or purpose of receivership proceedings which should lead the courts to deny to a demand followed by failure to pay, the statutory lien which, as against general creditors, entitles it to priority of payment in the distribution of the receivership assets. The Government claims no right to enforce its lien elsewhere than in the receivership proceeding or to interfere with the

court's possession of the taxpayer's property, either by distraint or otherwise. *Cf. In re Tyler,* 149 U. S. 164. It need hardly be said that the custody of the court can not possibly be affected by the process by which the lien arises. The lien affects only the order of distribution in the receivership proceeding itself.

There is nothing fearful or even novel in the notion that statutory liens may arise after the appointment of a receiver. The complainant in the present case recognized that possibility by excepting "the filing of mechanics' or other statutory liens" from the injunction against the institution and prosecution of judicial and statutory proceedings for which he prayed. (R. 16.)

Liens for current taxes undoubtedly can and do attach after the appointment of a receiver. *Union Trust Co.* v. *Ill. Midland R. Co.,* 117 U. S. 434, 461; *First Nat. Bank* v. *Ewing* (C. C. A. 5 C.), 103 Fed. 168, 188; *Bright* v. *Arkansas* (C. C. A. 8 C.), 249 Fed. 953, 955. But the year in which the income was earned on which the tax is levied is immaterial. The lien is the same. It has its source in the same statute. It arises in precisely the same way. Therefore, no valid reason is to be found in the fact that a tax is not a current tax for denying to it the lien which the statute expressly says shall result from the demand for its payment and the failure to pay it.

Mechanics' liens are another example of statutory liens which can and do arise after the ap-

pointment of a receiver. A mechanic or materialman may comply with the statutory conditions precedent to the creation or perfection of his lien after the receiver's appointment,[1] or, to avoid expense and delay, the courts recognize the lien as if the statutory conditions had been fulfilled.[2]

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[1] *Westinghouse Airbrake Co.* v. *Kansas City Southern Ry. Co.* (C. C. A. 8 C.), 137 Fed. 26; *Fenton* v. *Fenton Building Co.*, 90 Conn. 7; *Doty* v. *Auditorium Pier Co.*, 65 N. J. Eq. 768; *Commonwealth Roofing Co.* v. *North American Trust Co.* (C. C. A. 1 C.), 135 Fed. 984; *United States and Mexican Trust Co.* v. *Western Supply & Mfg. Co.*, 109 S. W. (Tex.) 377; *Filer & Stowell Co.* v. *Empire Lumber Co.*, 91 Ga. 657; *Van Frank* v. *Brooks*, 93 Mo. App. 412; *Withrow Lumber Co.* v. *Glasgow Inv. Co.* (C. C. A. 4 C.), 101 Fed. 863. In *Commonwealth Roofing Co.* v. *North American Trust Co.*, the court said (p. 989): "In other words, by appointing the receiver of the property upon which the lien attached, the Circuit Court assumed the control thereof and of the lienor, and stood in its path; and, having assumed such control, it also, on settled principles, assumed the obligation to do equity, and to protect the lienor so far as it had any just rights in the premises." In *Filer & Stowell Co.* v. *Empire Lumber Co.*, the court said (p. 658): "Failure to claim and record it could not be excused by the fact that the premises and mill on which the lien would have attached were put into the hands of a receiver by judicial proceedings before the time for recording had expired. The custody of the property by a receiver would be no impediment to claiming and recording the lien, and is wholly irrelevant as a reason for not doing so." In *Van Frank* v. *Brooks*, the court said (p. 426): "Nor was the intervenor debarred from proceeding to perfect and enforce a lien in the statutory mode by the order of the court placing the railroad property in a receiver's custody. * * * Courts of equity do not disregard plain statutes giving lienors a right to be paid before incumbrancers when they take charge of incumbered property at the latter's instance. They follow the law and uphold all its provisions as to priority."

[2] *Blair* v. *St. Louis, H. & K. R. Co.* (C. C. Mo.), 19 Fed. 861; *Central Trust Co.* v. *Texas & St. L. Ry. Co.* (C. C. Mo.), 23 Fed. 673; *Davis* v. *Foster*, 69 Pac. (Wash.) 1102. In *Central Trust Company* v. *Texas & St. L. Ry. Co.*, the court said (p. 873): "Where parties are entitled to a lien, and can secure it by certain proceedings under the statutes of the state, they are not required to go to the expense of such proceedings, but this court will treat it as though all needful steps had been taken to establish the lien."

Further, the argument that a statutory lien for taxes can and does attach after the appointment of a receiver is fortified by the fact that even before assessment and demand the Government's lien is inchoate.[3] The assessment of the tax merely determines its amount. The demand for its payment only fixes the time when payment must be made. Neither the assessment nor the demand is the source of the tax liability. The obligation to pay taxes, both those originally and those subsequently assessed, originates in the Revenue Acts and comes into being with the annual income upon which the taxes are levied. *Heyward* v. *United States* (C. C. A. 5 C.), 2 Fed. (2d) 467.[4] From the moment the income is earned the Government has a right to a lien for the tax thereon, a right which can not be defeated by the institution of

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[3] An inchoate lien is defined in *Henderson* v. *Mayer*, 225 U. S. 631, 639, as a right to a statutory lien; in *Kane & Co.* v. *Kinney*, 174 N. Y. 69, 73, as "a preferential statutory right in the nature of an unperfected equitable lien"; in *Hildreth Granite Co.* v. *City of Watervliet* (N. Y.) 161 App. Div. 420, 423, as an equitable lien given by statute.

[4] In this case it appeared that a partnership, which had been in existence since 1917, was incorporated in 1919. In 1922 the corporation was adjudicated bankrupt. In February, 1923, the Commissioner of Internal Revenue assessed an additional excess profits tax for the year 1917 and filed a claim therefor in the bankruptcy proceedings. The court held that the Government was entitled to priority of payment and said: "The liability of the partnership was for a tax. *That tax accrued in 1917, and then became a lien against the property of the partnership.* The corporation took this property subject to the tax lien, because it had notice through the former partners * * * who are chargeable with notice, although the assessment was not recorded until after the partnership assets were acquired. The bankrupt does not occupy the position of a purchaser without notice, and therefore is not entitled to rely on R. S. § 3186 (Comp. St. § 5908). Actual notice to it took the place of record notice." (Italics ours.)

receivership proceedings before the tax is actually assessed or demanded.

In *Henderson* v. *Mayer,* 225 U. S. 631, the question was whether the levy of a distress warrant within three days of bankruptcy was valid under Section 67*f* of the Bankruptcy Act. The provisions of that section are similar in purpose to the injunction commonly issued in a conservation receivership proceeding designed to maintain the status existing at the time the receivership proceeding is instituted. The levy had been made under a Georgia statute which gave a landlord a general lien on his tenant's property and provided that it "*shall date from the time of the levy of a distress warrant to enforce the same.*" Despite that language this court held that the lien was inchoate from the beginning of the tenancy and that the levy was valid, saying (p. 638):

> The statutory restrictions as to date, rank, and priority may be important in a controversy with other lien holders, but was wholly immaterial in this contest between the landlord and trustee, where the latter was only representing general creditors. *As against them the landlord had from the beginning of the tenancy the right to a statutory lien, which had completely ripened and attached before the filing of the petition in bankruptcy. The priority arising from the levy of the distress warrant was not secured because Mayer had been first in a race of diligence, but was given by law because of the*

nature of the claim and the relation between himself as landlord and Burns as tenant. (Italics ours.)

A similar question was involved in *Crane Company* v. *Pneumatic Signal Co.* (N. Y.) 94 App. Div. 53, under a statute giving a person performing labor for, or furnishing materials to, a contractor for the construction of a public improvement, a lien upon the public moneys applicable to the construction of such improvement, "upon filing notice of lien." A subcontractor filed his notice of lien *after* the institution of bankruptcy proceedings against the prime contractor. The court held the lien inchoate and the filing of the notice of lien valid under the Bankruptcy Act and said (p. 56):

> We regard the main question first above outlined to be authoritatively decided by the Court of Appeals in the case of *Kane Company* v. *Kinney,* 174 N. Y. 69 * * *. After a full and interesting discussion it was held that: "The filing of the notice of lien is the statutory method prescribed by which the party entitled thereto perfects his inchoate right to that interest which he acquires under the Mechanic's Lien Law by furnishing material or performing labor in the improvement of real property." It was further said: "A certain time is allowed in which the lien may be asserted or lost. *During that time there is a preferential statutory right in the nature of an unperfected equitable lien* in favor of the laborer, mechanic, materialman, or subcontractor. And

> when a notice of lien is filed that right is perfected." * * * And finally it was held that the inchoate right acquired by plaintiff in that case when it furnished its material or labor, when perfected by filing its notice of lien subsequent to the general assignment of the contractor, was superior to the general assignment or any rights acquired by the assignee or the creditors thereunder. (Italics ours.)

Statutes similar to those in the foregoing cases and to R. S. 3186, providing for liens upon the performance of specified conditions, have uniformly been construed as giving inchoate liens, the perfection of which is possible after the property upon which the lien is claimed passes into *custodia legis*. *Gates & Co.* v. *Stevens Construction Co.*, 220 N. Y. 38; *Hildreth Granite Company* v. *City of Watervliet* (N. Y.), 161 App. Div. 420; *Gates & Co.* v. *National Fair & Exposition Ass'n.*, 172 App. Div. 581; aff'd. 225 N. Y. 142; *In re Grissler* (C. C. A. 2 C.), 136 Fed. 754; *In re Coulter*, Fed. Cas. No. 3276; *In re West Norfolk Lumber Co.* (D. C. Va.), 112 Fed. 759; *Mott* v. *Wissler Min. Co.* (C. C. A. 4 C.), 135 Fed. 697. Surely no more than bankruptcy can an equity receivership operate to defeat such liens. The courts so hold, as we have shown.

Therefore, paraphrasing the language of this Court in *Henderson* v. *Mayer, supra,* and applying it to the facts in the case at bar, it follows that the fact that the demand for payment of the tax was

not made until after the receivership proceedings were instituted and that notice of the lien was not filed as required by R. S. 3186, is wholly immaterial in this controversy between the Government and general creditors as against whom, from the end of the taxable year in which the income was earned, the Government had a right to a statutory lien which ripened and completely attached upon the failure of the Gidding Company to pay the tax upon demand. *Berwind-White Coal Mining Co.* v. *Metropolitan S. S. Co.* (C. C. Me.), 166 Fed. 782, aff'd. (C. C. A. 1 C.), 173 Fed. 471; *Fagan* v. *Boyle Ice Machine Co.*, 65 Tex. 324. See *Commonwealth Roofing Co.* v. *North American Trust Co., supra.*

The petitioner's argument that the Government acquired and could acquire no lien under R. S. 3186 because payment of the tax was not demanded until after the receiver's appointment, is an excellent illustration of that sterile logic which alone may be employed in an attempt to defeat the Government's claim to priority over general creditors, which proceeds inevitably from false premises to an unsound conclusion, and which never once penetrates the heart of the problem. The petitioner seeks to bring general creditors within the proviso of R. S. 3186. His argument is that by bringing his bill the complainant, by some legal legerdemain, acquired the status of a judgment creditor, a status which by some further magic he was able to transmit to the receiver and through the receiver to all general creditors, and that therefore, even if the Govern-

ment acquired a lien, it was invalid as against general creditors who had been thus transformed. The argument is, further, that no lien could attach after the appointment of the receiver, because his appointment operated as an "equitable levy in favor of all creditors." These arguments we shall answer in turn.

(1) *Neither the complainant, nor any other general creditor, nor the receiver, is a judgment creditor within the meaning of R. S. 3186.*

The Government does not contend, as the petitioner suggests, that if the complainant or any other creditor of the Gidding Company had in fact been a judgment creditor with a lien on the Company's property when the bill was filed, the Government's lien would have been valid as against such judgment creditor. The Government concedes that in any proceeding in which its lien clashes with the lien of a judgment creditor, the latter must prevail unless notice of the Government's lien has been filed as required by statute. However, this controversy is a contest, not between the Government and judgment creditors, but between the Government and general creditors. No party to this controversy is in fact a judgment creditor, much less a judgment creditor with a lien. The effort is to give the complainant, and through him the receiver, and through the receiver all general creditors, the artificial status of judgment creditors, and thus to invalidate the Government's lien.

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The effort is predicated chiefly upon *American & B. Securities Co.* v. *American & B. Mfg. Corp.* (D. C. N. Y.), 275 Fed. 121.[5] In that case, as in this, a receiver was appointed at the suit of a simple contract creditor. The defendant had given a chattel mortgage which was void against all creditors, whether judgment or general, under the New York law, because unfiled. *Karst* v. *Gane,* 136 N. Y. 316; *Stephens* v. *Perrine,* 143 N. Y. 476. In the language of the court (p. 122), the only question was whether the receiver represented creditors within the meaning of the New York Lien Law. The court answered the question in the affirmative. Obviously it was merely a procedural question which had nothing to do with substantive rights. The court did not hold, as the petitioner suggests, that general creditors in a proceeding such as this are endowed with the same rights they would have were they in fact judgment creditors. The court did not decide that in a proceeding such as this the receiver can defeat claims which are good as against general creditors.

That we have correctly interpreted the decision in the *American & British Securities Co.* case is shown by *Bell* v. *New York Steam Power Co.* (D. C. N. Y.), 183 Fed. 274, and *Cornelius* v. *C. C. Pictures, Inc.* (D. C. N. Y.), 296 Fed. 487, aff'd. (C. C. A. 2 C.), 296 Fed. 490. In the *Bell case* the same question was before the same judge. In the course of his

[5] It is to be observed that the opinion was rendered by Learned Hand, J., who also concurred in the opinion rendered by the court below in the case at bar.

opinion he distinguished between receivers in statutory supplementary proceedings in New York and receivers in proceedings like the present one, by saying (p. 276) that " the former stand explicitly in the right of judgment creditors, *and are, therefore, not precisely like sequestration receivers in equity.*"

When the question whether a sequestration receiver has the status of a judgment creditor as a matter of substantive law has arisen, the answer has been an unequivocal negative. The question has been raised in striking form in New Jersey. Under the statutes of that State unfiled chattel mortgages are void as against *general creditors,* but unfiled conditional sales agreements are void only as against *judgment creditors.* Because of that difference, it is uniformly held that a sequestration receiver may defeat unfiled chattel mortgages, but can not question unfiled conditional sales agreements. *Smith* v. *Hotel Ritz Co.,* 74 N. J. Eq. 296; *Falaenau* v. *Reliance Steel Co.,* 74 N. J. Eq. 325; *Cumberland Trust Co.* v. *Ayers & Sons Co.,* 83 N. J. Eq. 479; *Rapoport* v. *Rapoport Express Co.,* 90 N. J. Eq. 519; *Wood* v. *Cox,* 92 N. J. Eq. 307

But whatever the law in other forums the matter has long since been put at rest in this Court by the decision in *Day* v. *Washburn,* 24 How. 352, in which simple contract creditors, who had filed a bill to set aside an assignment as fraudulent, contended that merely because they had filed the bill they should be given priority over subsequently inter-

vening creditors of the same class. The Court rejected that contention and said (p. 355):

> The court of chancery does not give any specific lien to a creditor at large, against his debtor, further than he has acquired at law; for, as he did not trust the debtor on the faith of such lien, it would be unjust to give him a preference over other creditors, and thus defeat a pro rata distribution, which equity favors, unless prevented by the rules of law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired, which a court of chancery will enforce. * * *
>
> The two firms, therefore, who filed the bill, the appellants here not having reduced their demands to judgment and execution before seeking relief against the fraudulent assignment of the debtor, are not in a situation to set up any claim to a preference over the other co-complainants, or to object to an equitable distribution of the assets among all the creditors. * * * The objection that the demands of the appellants had not been reduced to a judgment and execution before filing the bill, would have been fatal to the relief sought, if taken in time by the defendants. It was waived, however, both as respected the appellants and the other co-complainants; and, as the court was left unembarrassed by the objection, it was right in proceeding to dispose of the property and effects of the

debtor, and to make the proper application of them; and, as we have seen, neither of the creditors had acquired a preference at law, the application in chancery, upon its own principles, was a ratable distribution among all the creditors as decreed by the court below.

That decision reveals, if, indeed, anything is needed to reveal, the utter lack of merit in the petitioner's contention based upon *Re Metropolitan Railway Receivership, supra,* that the complainant and the receiver in a receivership proceeding instituted by a general creditor acquire the artificial status of judgment creditors merely because the defendant waives the jurisdictional objection that the complainant is not a judgment creditor.

(2) *The doctrine of equitable execution does not prevent the Government's statutory lien for taxes from attaching after the appointment of a receiver.*

"Confusion of ideas," said Cotton, L. J., in *In re Shephard,* 43 Ch. Div. 131, 135, " has arisen from the use of the term ' equitable execution.' The expression tends to error." Its tendency to error was never better illustrated than in the case at bar in which a general creditor attempts to make use of it to defeat the Government's right to priority.

The doctrine of equitable execution originated in creditors' bills, essentially selfish proceedings brought to obtain satisfaction of the claim of the moving creditor. As the reward of his diligence he

obtained a preference over other creditors of the same class, by analogy to the law. A legal levy being impossible, the filing of the bill was regarded as an equitable execution, sufficient to justify the vigilant creditor's preferment over other creditors. *Freedman's Savings & Trust Co.* v. *Earle*, 110 U. S. 710; *Sage* v. *Memphis, etc., Railroad Co.*, 125 U. S. 561; *Metcalf* v. *Barker*, 187 U. S. 156; *Atlantic Trust Co.* v. *Dana* (C. C. A. 8 C.), 128 Fed. 209. Thus, equitable execution was the analogue of legal execution. However, it was a fiction; it was no execution, but a substitute for execution. *In re Shephard, supra.*

A simple contract creditor may maintain a creditor's bill only if the defendant waives the jurisdictional requirement of judgment and execution. *Re Metropolitan Railway Receivership, supra; Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491. However, the effect of the defendant's consent is not to transform the moving creditor into a judgment creditor, but quite the reverse. Whatever the purpose of the bill, it proceeds for the benefit of all creditors. The complainant gains no advantage over other creditors by his diligence. In such a proceeding the fiction of equitable execution acquires a new meaning and purpose. It is descriptive of the process by which the court obtains custody of the *res*. It protects the court's custody against invasion. See *Day* v. *Washburn, supra; Luhrig Collieries Co.* v. *Interstate Coal & Dock Co.* (D. C. N. Y.), 281 Fed. 265; *Pennsylvania Steel Co.*

v. *New York City Railway Co.* (C. C. A. 2 C.), 198 Fed. 721, 737. *But the filing of the bill no longer creates a lien. Equitable Trust Co.* v. *Connecticut Brass & Mfg. Co.* (C. C. A. 2 C.), 290 Fed. 712, 726.

The receivership thus becomes a shield to guard the assets. It is no longer a sword to cut down the rights of any interested party in behalf of any other. The receiver acts for all parties, indifferent as between them. He holds for the benefit of whomsoever in the end it shall be found to concern. *Fosdick* v. *Schall*, 99 U. S. 235, 251; *Davis* v. *Gray*, 16 Wall. 203, 217; *H. K. Porter Co.* v. *Boyd* (C. C. A. 3 C.), 170 Fed. 4; *Pennsylvania Steel Co.* v. *New York City Railway Co., supra.* In *Pusey & Jones Company* v. *Hanssen, supra,* it is said (p. 497):

> A receivership is not final relief. The appointment determines no substantive right; nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights.

There is nothing, therefore, in the doctrine of equitable execution or in the character or purpose of a receivership proceeding initiated by general creditors, to prevent the creation or perfection of statutory liens, including tax liens, after the bill is filed, *cf. Pennsylvania Steel Company* v. *New York City Railway Co., supra* (p. 740); *Wm. Filene's Sons Co.* v. *Weed*, 245 U. S. 597, and, as

we have seen, the courts so hold. Indeed, they go much further, and in the distribution of receivership assets, in spite of forms and formulae, in many instances recognize mere equities as superior not only to the claims of general creditors, but to liens existing when the bill was filed.[6]

It is, therefore, clear that neither by virtue of any preexisting right nor by virtue of any right accruing to them upon the filing of the bill, do the simple contract creditors of the Gidding Company occupy, either in their own persons or vicariously through the receiver, any better position than that of general creditors as against whom the Government's lien is not invalidated by its failure to file notice thereof. The Government did not institute this receivership proceeding and its rights should not suffer because of its institution by general creditors for their own purposes.

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[6] Thus, for reasons of public policy or special considerations affecting the claims or the claimants, it has been considered equitable to give priority to so-called supply creditors, *Fosdick* v. *Schall*, 99 U. S. 235; *Miltenberger* v. *Logansport R. R. Co.*, 106 U. S. 286; Southern *Railway* v. *Carnegie Steel Co.*, 176 U. S. 257; to sureties who have aided in maintaining a company as a going concern, *Union Trust Co.* v. *Morrison*, 125 U. S. 591; *Jones* v. *Central Trust Co.* (C. C. A. 6 C.), 73 Fed. 568; *City Trust Co.* v. *Sedalia Light & Traction Co.* (D. C. Mo.), 195 Fed. 845; to shippers who have paid excessive freight rates, *Love* v. *North American Co.* (C. C. A. 8 C.), 229 Fed. 103, *United States & Mex. T. Co.* v. *Kansas City, M. & O. Ry. Co.* (D. C. Kan.), 240 Fed, 505; to material men and laborers for whose benefit payments due a contractor were withheld, *Belknap Hardware & Mfg. Co.* v. *Ohio River C. Co.* (C. C. A. 6 C.), 271 Fed. 144; to consumers who have paid deposits to a gas company, *Pintsch Compressing Co.* v. *Buffalo Gas Co.* (C. C. A. 2 C.), 280 Fed. 830; and to an administrator with whom an agreement to compromise a claim for wrongful death had been made before receivership, *Harmon* v. *Blackwell* (C. C. A. 6 C.), 232 Fed. 440.

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Congress has established an extra-judicial system for the collection of the internal revenue, which was designed to insure, and which in the absence of judicial interference will normally result in, its prior payment. It is therefore the plain duty of the courts either to permit that system to function or, in the alternative, to direct the payment of taxes in advance of the claims of general creditors

As we have pointed out, the Revenue Acts incorporate within themselves not only R. S. 3186, but *all* applicable administrative provisions of law for the collection of the internal revenue. These provisions, found in the Revised Statutes (*supra*, p. 7 et seq.), constitute a complete extrajudicial system for the collection of taxes. The collectors of internal revenue are required to collect all the taxes imposed by law. (R. S. 3183.) Within ten days after receiving any list of taxes from the Commissioner of Internal Revenue they must give notice and demand payment of the taxes stated therein. (R. S. 3184.) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount of the tax is made a lien upon all of the taxpayer's property, as we have pointed out. (R. S. 3186.) If the tax is not paid within ten days after demand, the collector may collect it by distraint and sale of the taxpayer's personal property (R. S. 3187), or, if that is insufficient, by seizure and sale of his real estate (R. S. 3196).

To guard this administrative system against judicial invasion or interference, Congress has forbidden the maintenance of suits to restrain the assessment or collection of any tax (R. S. 3224).

By establishing in the Revenue Acts and the Revised Statutes an extra-judicial system for the assessment and collection of taxes, which is obviously designed and fully effectual to insure their priority of payment—in other words, by giving taxes a remedial preference—Congress has clearly expressed the legislative will that taxes shall be paid in advance of a taxpayer's general indebtedness. In any race of diligence between the Government and a general creditor, the Government must inevitably prevail, as Congress manifestly intended that it should prevail. Merely by demanding the payment of its taxes, the Government may perfect a lien therefor upon all the property of the taxpayer superior to the claims of general creditors, and after ten days it may proceed to foreclose its lien by seizure and sale. This Court has often recognized the summary character of the administrative system for the collection of taxes and the imperative necessity for such a system.[1] No such sum-

[1] In *Kelly* v. *Pittsburgh*, 104 U. S. 78, the Court said (p. 80): "Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. *The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure*, which in regard to that matter is, and always has been, due process of law." (Italics ours.)

In *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, the court said (p. 282): "It may be added that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. *Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding*, and sometimes by systems of fines and penalties, but always in some way observed and yielded to." (Italics ours.)

mary method of collection is given or open to general creditors. As the court said in *Jack v. Weiennett,* 115 Ill. 105, 109:

> A creditor has no right to distrain and sell property. He must first get a judgment and an execution. But the State, because of the importance and urgency of its claim, is not required to wait for a judgment. If a tax due is not paid on demand, the collector may proceed to seize property and sell it for its payment. Before property can be protected, and the right of creditors enforced, the State must have the means of subsistence. It can not perform its functions without them, and they can only be obtained through some system of taxation. *The claim for the payment of taxes upon the citizen is, therefore, of necessity paramount to all other claims against his property.* (Italics ours.)

Perhaps no principle is more firmly embedded in our constitutional and legal systems than that of the inviolability of the administrative machinery for the assessment and collection of taxes from judicial obstruction. *Cheatham* v. *United States,* 92 U. S. 85; *Graham* v. *du Pont,* 262 U. S. 234; *Robinson* v. *City of Wilmington* (C. C. A. 4 C.), 65 Fed. 856. Furthermore, not only do the Revenue Acts and the administrative provisions of law for the collection of the taxes levied thereby make no exception in favor of insolvents or of businesses or property *in custodia legis,* but the courts themselves have uniformly

recognized that no exemption from taxation can be gained by the receivership process. *In re Tyler,* 149 U. S. 164; *Ex parte Chamberlain* (C. C. S. C.), 55 Fed. 704; *Dysart* v. *Brown,* 100 Ga. 1. As the Supreme Court of Georgia said in the *Dysart case* (pp. 2, 4):

> The right to levy and collect taxes for the support of its institutions of government is one of the supreme attributes of a sovereign power, and this charge upon the property of the citizen is, by the law of this State, made superior to any other encumbrance which may be imposed upon it, either by contract or by law. It is universal in its application, and the mere fact that the property of a corporation may be in the hands of a receiver appointed by a court of equity, affords no exception to the rule, and does not exempt the property of such a corporation from taxation. Property so circumstanced is as much bound to sustain its proportionate share of the burdens of government as any other, and being liable for taxation, there must of necessity be some means for the enforcement of this charge in favor of the State. * * *
>
> It being fundamental that courts, like persons, should pay the charges imposed for taxes upon property in their custody, it is their duty to make such orders as will compel their representatives to discharge this obligation. *It is not within the general power of a court of equity, by the appointment of a receiver, to establish a judicial pro-*

> *tectorate over the assets of an insolvent person or corporation, and by doing so, indefinitely withdraw the same from appropriation to the payment of taxes lawfully assessed against it.* (Italics ours.)

In *Ex parte Chamberlain*, the *Tyler* case in the lower court, the court said (p. 706):

> There can be no doubt that property in the hands of a receiver of any court, either of a state or of the United States, is as much bound for the payment of taxes, state, county, and municipal, as any other property. Persons cannot, by coming into this court, and for the promotion of their interests, applying for and obtaining the appointment of receivers, obtain exemption from the paramount duty of a citizen.

Upon what theory then is a court of equity, which has gained possession of a taxpayer's property, to ignore the legislative mandate contained in the Revenue Acts that the taxes levied thereby *shall* be paid and to thwart the legislative intention expressed both in those Acts and in the Revised Statutes that they shall *first* be paid? Eminent judges, unable to find such a theory, have gone so far as to hold that the fact that property is *in custodia legis* does not and should not prevent its seizure and sale for the purpose of satisfying taxes.

In *Stevens* v. *New York & O. M. R. Co.* (C. C. N. Y.), 13 Blatchf. 104; Fed. Cas. No. 13405, a receiver appointed in a foreclosure action sought to enjoin a state tax collector from selling property in

the receiver's custody, under tax warrants, alleging that the taxes had been illegally assessed. Blatchford, J., afterwards Mr. Justice Blatchford, denied the injunction and said:

> There is no prerogative of sovereignty which is of higher importance than the power of taxation, which includes the collection, as well as the assessing, of the taxes. The very existence of the state as a government depends upon the exercise of such power. * * * There is no sound principle upon which the property of a person or a corporation, which is placed in the hands of a receiver by a court of justice, for the purposes of a suit pending in such court, can be regarded as being thereby rendered exempt from the operation of the tax laws of the government within whose jurisdiction such property is situated.

In *Central Trust Co.* v. *Wabash, St. L. & P. Ry. Co.* (C. C. Mo.), 26 Fed. 11, a receiver sought to attach a collector of taxes who had issued his warrant and levied on property in the receiver's possession. Brewer, J., afterwards Mr. Justice Brewer, said:

> It is not represented in the petition that the taxes are not just and legal, or that they are not due. The statutes of Missouri make it the duty of the collector, if the taxes are not paid, to issue his warrant and seize property, and sell the same as upon execution. * * * Be that as it may, I think that in levying and collecting taxes the state is ex-

> ercising its sovereign power, and that there should be no interference with its collection of those taxes in its prescribed and regular methods, even by a court having property in the possession of its receivers, unless it is first charged that the taxes are in some way illegal or excessive. The mere fact that the receivers have no money on hand to pay the taxes is no excuse for stopping the process of the state for their collection. It may be hard for the road to pay these taxes, but it can be no harder for a corporation in the hands of receivers to pay taxes than it is for an individual, and the remedy of the state is in each case the same.

However, it may be conceded that in the *Tyler* case, *supra,* this Court laid down a different rule. In that case Mr. Chief Justice Fuller, speaking for the Court, said (p. 182):

> The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis,* and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and a

wanton disregard of the orders of the court in respect of it. *The maintenance of the system of checks and balances characteristic of republican institutions requires the coordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other,* and the possession of property by the judicial department can not be arbitrarily encroached upon save in violation of this fundamental principle.

The levy of a tax warrant, like the levy of an ordinary *fieri facias,* sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face. (Italics ours.)

If, as this Court held in the *Tyler* case, it is the duty of tax collectors to refrain from the seizure and sale of property in the custody of the courts, in the interest of the orderly administration of justice and because of the relationship and coordinate rank of the judicial and executive branches of the Government under our constitutional system,

it would seem to be equally the duty of the courts to direct the prior payment of the Government's taxes and thus to give effect to the legislative intent embodied in the administrative system for their collection. A receivership may justify a variation of the means; it can not justify a change in the result. On no other theory may the courts interrupt executive processes authorized by statute for the collection of taxes. The judicial, no less than the executive, must respect and observe the expressed will of the legislative department in all matters within legislative control.

This Court has recognized the validity of that proposition. In *In re Tyler, supra,* the Court said (p. 186):

> The inevitable conclusion that this must be so, if constitutional principles are to be respected in governmental administration, does not involve interruption in the payment of taxes or the displacement or impairment of the lien therefor, but, on the contrary, *it makes it the imperative duty of the court to recognize as paramount, and enforce with promptness, and vigor, the just claims of the authorities for the prescribed contributions to state and municipal revenue.* * * * The tax collector is a ministerial officer, * * * and no reason is perceived why he should not bring his claim to the attention of the court, while, on the other hand, it is clearly the duty of the receiver to do so, if he contends that the taxes are illegal. If found valid, they must be paid; if invalid,

> the court will so declare, subject to the review of the appellate tribunals. (Italics ours.)

Other courts, federal and state, have frequently expressed and applied the same principle. In *Burleigh* v. *Chehalis County* (C. C. Wash.), 75 Fed. 873, a receiver sought to restrain county officers from selling receivership property for delinquent taxes. The court overruled a demurrer to the bill and said (p. 873):

> All the property of the Northern Pacific Railroad Company situated in this state, including real estate, is, and was at the date of the judgment referred to, in the legal custody of this court, through its receiver, and it is not subject to seizure or sale under process emanating from any other authority. This court will require its receiver to pay all lawful taxes, and there is no necessity for burdening the property with the expense of a sale under the state revenue law; and such proceedings, which interfere with the administration of the estate in receivership, can not be permitted.

The same matter was subsequently presented to the court on the merits in *Northern Pacific R. Co.* v. *Galvin* (C. C. Wash.), 85 Fed. 811, and the court said:

> In ruling upon questions raised in settling the issues in the pleadings, I expressed my opinion, based upon the decision of the supreme court of the United States in the case of *In re Tyler*, 149 U. S. 164–169, 13

> Sup. Ct. 785, to the effect that a collector of taxes can not legally execute process for the collection of delinquent taxes by sale of property in the custody of a receiver appointed by a United States court. At the same time I gave a plain intimation that, upon an application to this court, the receivers would be ordered to pay all taxes legally chargeable against the property of the railroad company. * * * Upon the authority of these decisions, I hold that the lands were subject to taxation for state, county, and district purposes at the time of the annual assessment for the taxes of 1891; and, if taxes upon said lands had been legally assessed and levied, the court would feel obliged to order payment thereof as a condition of the granting of any relief to the plaintiff; and, upon the payment of the amount of taxes legally levied, the plaintiff would be entitled to an injunction, for the reason that at the time of the commencement of this suit the lands were in the custody of this court, through its receivers, and the treasurer of Lewis county could not lawfully proceed with the sale thereof.

In *Ledoux* v. *La Bee* (C. C. S. D.), 83 Fed. 761, a receiver sought to enjoin the sale of certain personal property by the county treasurer to satisfy taxes that had accrued *before*, as well as after, the appointment of the receiver. On the authority of the *Tyler case*, the court held that the property, being *in custodia legis*, was not subject to seizure and sale by the tax officials. The court therefore

ordered that the county treasurer should restore possession of the seized property to the receiver and that the receiver should thereupon pay the taxes.

In *Gutterson* v. *Lebanon Iron & Steel Company* (C. C. Pa.) 151 Fed. 72, receivers were appointed, as in the case at bar, upon a bill filed by general creditors for the purpose of conserving the defendant's assets. The question before the court was the propriety of certain payments by the receivers for taxes, *past* and current, and for other purposes. The court approved the payment of the taxes, saying (p. 75):

> The same is true of taxes past and current, which had to be paid or the personal property would be liable to be levied upon, and which the receivers therefore properly took care of, in order to protect it, without any order.

The application of the doctrine that a court of equity must direct the prior payment of taxes in a receivership proceeding if it stops the executive machinery for their collection, extends as well to past as to current taxes, as well to taxes which have not become, as to taxes which are, liens on the property in the court's possession. *Ledoux* v. *La Bee, supra; Coy* v. *Title Guarantee & Trust Co.* (C. C. A. 9 C.), 220 Fed. 90; *Bear River Paper & Bag Co.* v. *City of Petosky* (C. C. A. 6 C.), 241 Fed. 53. The duty of the court does not arise from the existence of a technical lien. It grows out of the unequivocal expression of the legislative purpose to give taxes

priority of payment; it is essential to the orderly administration of government. It is born of the relationship between the executive and the judiciary; and it inheres in our governmental structure. In *Greeley* v. *The Provident Savings Bank,* 98 Mo. 458, quoted with approval in the *Tyler* case, a tax collector intervened in a receivership proceeding for an order directing the receiver to pay certain taxes. The court directed their payment and said (p. 460):

> The amount of the taxes was undisputed, and the receiver had in his hands funds sufficient to pay them, and we think the order should have been made. *It may be conceded that the state did not have an express lien upon the assets that went into the hands of the receiver,* but it had a right paramount to other creditors to be paid out of those assets, * * * a right which it could have enforced through its revenue officers by the summary process of distress * * * but for the fact that the property and assets of its debtor had passed into the custody of its courts; whose duty it was in the administration and distribution of those assets to respect that paramount right, upon the untrammelled exercise of which, depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the distribution of assets *in custodia legis* except in subordination to that right. The ordinary revenue officers

> of the state being deprived of the ordinary means of securing the state's revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied, and upon the receiver to see, that the taxes due the state were paid before the estate was distributed to other creditors and we can conceive of no scheme of administration that the court could properly adopt by which the state's demand could be reduced to the level of an ordinary debt, and be cut off unless presented to the court for allowance. (Italics ours.)

In *George* v. *St. Louis Cable & W. Ry. Co.* (C. C. Mo.), 44 Fed. 117, a receiver was appointed on October 17, 1889. An interlocutory decree directed the sale of the property in receivership, " subject to all liens for taxes." The court held that taxes on personal property for the year 1889 should be first paid out of the resulting fund, and said (p. 118):

> It seems to be the law in Missouri that for taxes assessed on personal property the state has no lien on the property until an actual levy has been made under the tax bill. * * * Such being the local law with respect to taxation, it follows that the provision of the interlocutory decree directing a sale to be made " subject to all liens for taxes " is no obstacle in the way of allowing the state a priority as to the tax bill against personalty, for as to such property there was no lien at the time of the sale; and, because

> the purchaser took the personal property unincumbered by a tax-lien, the state in all probability will lose the bill, unless the court directs its payment out of the proceeds of the sale. Inasmuch as the receiver appointed in this case had possession of the property on account of which the tax was imposed during the period within which the collector might have made, and probably would have made, a levy but for the existence of the receivership, it is plainly the duty of the court to see that the tax bill against personalty is paid in preference to all other demands. The appointment of a receiver and sale of property by a decree of this court, in a case of this character, will not be allowed to interfere with or to defeat the collection of the public revenue. The bill against personal property will therefore be paid.

While the foregoing cases involve State taxes they were not decided on the theory that the taxes had become liens or were given priority under State statutes, or that the States in question had adopted the common law prerogative of priority.[8] The

[8] And, as a matter of fact, only in New York, Georgia, Maryland, and Missouri do the courts hold that the common law prerogative exists. *Matter of Carnegie Trust Co.*, 206 N. Y. 390; *Robinson* v. *Bank of Darien*, 18 Ga. 65; *State* v. *Rowse*, 49 Mo. 586; *State* v. *Bank of Maryland* (Md.), 6 Gill & J. 205. In New Jersey, Mississippi, Wyoming, and South Carolina, the courts have held that it does not exist. *Freeholders* v. *State Bank*, 30 N. J. Eq. 311; *Anderson* v. *Mississippi*, 23 Miss. 459; *Commissioners* v. *Greenwood* (S. C.), 1 Desaussure 450; *State* v. *Foster* (Wyo.), 38 Pac. 926. See also *City and County of Denver* v. *Stenger* (C. C. A. 8 C.), 295 Fed. 809. Apparently the courts of the other States have not passed upon the question.

rationale of these cases is that property in receivership is not thereby rendered exempt from the operation of State tax laws, and that though State tax officials may not seize property in the possession of the federal courts for the purpose of satisfying taxes, it is the duty of the federal courts for that very reason and because of the relationship between the National and State governments to direct the prior payment of State taxes. That principle is equally applicable to federal taxes because of the relationship between and the coordinate rank of the judicial and executive branches of the federal government.

Indeed, individuals who have been deprived of summary processes for the collection of their claims because of the court's possession of the property of their debtors, have been given a similar priority. Thus landlords have been held to be entitled to priority of payment of their rent in receivership proceedings to compensate them for the loss of their remedy of distraint resulting from the court's custody of their tenant's property.[9]

In *Gaither* v. *Stockbridge,* 67 Md. 222, it was said (p. 226):

> In those cases where the goods of the lessee are remaining on the demised premises at or after the time when the rent becomes due, and the landlord seeks to exercise his right to distrain, and the only impediment to the

[9] See *In re Chauldron & Peyton* (D. C. Md.), 180 Fed. 841, 846; *Paine* v. *Sykes,* 72 Miss. 351; *Austin* v. *O'Reilly* (C. C. Miss.), 2 Woods 670, Fed. Cas. No. 665; *In re West Side Paper Co.* (C. C. A. 3 C.), 162 Fed. 110, 111; *Henderson* v. *Mayer,* 225 U. S. 631, 637.

> exercise of that right is the possession of the Court, by its receiver, it seems to be a settled rule of practice to order the receiver to pay the arrears of rent out of the proceeds of the property, or to permit the landlord to proceed with his distress, notwithstanding the possession of the receiver.

Chancellor Walworth said in *Noe* v. *Gibson* (N. Y.) 7 Paige 513, 515:

> Where the receiver is in possession of property upon which a third person has a claim for rent, the proper course for the landlord is to apply to the court, upon notice to the receiver, for an order that the receiver pay the rent or that the landlord be at liberty to proceed by distress or otherwise as he may be advised.

There is no injustice involved in giving the Government priority for its taxes over general creditors in a case like this. When the receivership proceeding was instituted neither the Government and general creditors nor their respective claims stood on the same plane. The Government's taxes were of a higher order than the creditors' debts. Furthermore, the Government was in a preferred position with respect to its taxes. It had an inchoate lien therefor, and it had available to it summary administrative remedies for their collection, the application of which would have resulted in their priority of payment. The Government should not be deprived of these advantages by the institution

of the receivership proceedings. As the court said in *Jones* v. *Arena Publishing Co.*, 171 Mass. 22, 28, " It would be a plain injustice if a general creditor, by resorting to equity for the administration of its debtor's goods, merely for the reason that by its aid the amount to be derived would be larger, could gain a further advantage by reducing to the level of common creditors workmen, whose wages would have priority if the assets were left to be administered at law, or could thus place his own debts upon an equality with taxes which would have been paid in full had not equity intervened."

III

Independently of statute, the United States were entitled to priority of payment of both the customs duties and the income tax involved in this case, because (A) priority of payment inheres in the very concept of a tax and (B) the right to priority of payment of taxes is an attribute of the sovereignty of the Government

A

Priority of payment is inherent in the concept of a tax

In levying taxes, the Government is exercising one of the greatest, the most important, and the most necessary of its sovereign powers. In *McCulloch* v. *Maryland*, 4 Wheat. 316, 428, Chief Justice Marshall said:

> It is admitted, that the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which

> it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself.

In *Nicol* v. *Ames,* 173 U. S. 509, 515, the Court said of the power to tax:

> The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy but it is also the power to keep alive.

In 1 Cooley, Taxation (4th ed.), Sec. 57, the taxing power is thus described:

> The power of taxation is an essential and inherent attribute of sovereignty, belonging as a matter of right to every independent government. It is possessed by the government without being expressly conferred by the people. The power is inherent in the people because the sustenance of the government requires contributions from them. * * * Constitutional provisions relating to the power of taxation do not operate as grants of the power of taxation to the government, but instead merely constitute limitations upon a power which would otherwise be practically without limit.

A tax partakes of the lofty character of the great power of which it is the offspring. It rises to the height of its source. " A tax is a demand of sover-

eignty." *Case of the State Freight Tax,* 15 Wall. 232, 278. It is a civil obligation, not a personal convention. *Guarantee Co.* v. *Title Guaranty Co.,* 224 U. S. 152, 160. A tax is not a debt. A debt is an obligation arising out of contract, express or implied. A tax is an impost levied for the support of the Government. The consent of the taxpayer is not necessary to its enforcement. It operates *in invitum. Meriwether* v. *Garrett,* 102 U. S. 472, 514; *Crabtree* v. *Madden* (C. C. A. 8 C.), 54 Fed. 426; *City of Camden* v. *Allen,* 26 N. J. L. 398.

Taxes are of higher order than debts, even than debts due the Government, and in respect to them the Government is not a creditor. *United States* v. *Eggleston* (C. C. Ore.), Fed. Cas. No. 15027; *cf. Food Controller* v. *Cork* [1923] A. C. 647. The Government's relation to its taxes is different from and superior to that of a creditor to a debt. *United States* v. *McHatton* (D. C. Mont.), 266 Fed. 602. In *State* v. *Rowse,* 49 Mo. 586, the court said of the liability for taxes (p. 592):

> The liability for them is not an ordinary one, and can not be likened to a common debt. Their collection is vital to the enforcement of the law and the very existence of government, and I know of no authority that places the obligation to pay them upon a level with liabilities upon contracts.

Since the very existence of the Government depends upon the collection of the public revenue, the claim for taxes is paramount to all other claims

against the citizen. In *Jack* v. *Weiennett, supra,* the court recognized this to be true and said (p. 110):

> Before property can be protected, and the rights of creditors enforced, the State must have the means of subsistence. It can not perform its functions without them, and they can only be obtained through some system of taxation. *The claim for the payment of taxes upon the citizen is, therefore, of necessity paramount to all other claims against his property.* (Italics ours.)

In *Greeley* v. *The Provident Savings Bank, supra,* the court said (p. 460) that the State had a right paramount to other creditors to be paid its taxes out of receivership assets, and that in the administration and distribution of those assets it was the duty of the receiver "to respect that paramount right, upon the untrammelled exercise of which depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it."

In *Coy* v. *Title Guarantee Co.* (C. C. A. 9 C.), 220 Fed. 90, the court said (p. 92):

> It is too clear for argument that the appointment of a receiver and the taking of property into the hands of the court through its officer does not withdraw it from taxation. It remains subject to assessment and to payment of all legal taxes thereon while *in custodia legis,* to the same extent as it was while in the possession of the owner.

> And whether or not such taxes be a lien or a debt by the laws of the government within whose jurisdiction the property is situated, such taxes are and should be regarded by the courts as a preferred and paramount claim over all other claims, for they are essential to the existence and maintenance of the very government under which the property is acquired and protected.

Thus, implicit in the nature of a tax is not only the right to promptness of payment, *Springer* v. *United States,* 102 U. S. 586, 594, but to priority of payment.

As Learned Hand, J., said below in this case in his concurring opinion in *Liberty Mut. Ins. Co.* v. *Johnson Shipyards Corporation* (C. C. A. 2 C.), 6 Fed. (2d) 752, 758:

> A tax is an exaction imposed by the sovereign for its own purposes, which we should assume to be of an importance paramount to the rights of an individual. Besides it does not presuppose, like a debt, any voluntary acceptance of the hazard of the taxpayer's continued solvency. Perhaps it is easier to deduce the priority from such considerations than to establish it by precedent. * * * Whatever may be the final upshot, it seems to me unnecessary for the present to go further than the facts at bar, or to say more than *the nature of a tax gives it, independently of statute, priority to debts due individuals,* certainly to such as sound in contract, and these are all we have now to consider. (Italics ours.)

Similarly, in *State of Minnesota* v. *Central Trust Co.* (C. C. A. 8 C.) 94 Fed. 244, the court said (p. 247):

> It has been held frequently that a tax lawfully imposed by the state on its citizens is not an ordinary debt, but it is an obligation which *by its very nature should be regarded as paramount to all other demands against the taxpayer, although the law imposing the tax does not in express terms declare such priority.* And in some well-considered cases the same priority has been accorded to a tax, although the statute imposing it failed to provide in so many words that it should be a lien on the property of the taxpayer. Such decisions proceed on the theory that the maintenance of good government and the public welfare are to such an extent dependent upon the prompt collection of taxes that demands of that nature should take precedence of all claims founded upon private contracts. * * * These decisions also express a thought which is generally prevalent in the public mind that taxes levied by the State for its own support are founded upon a higher obligation than other demands. The fact has also been recognized from time immemorial that every sovereignty ought to be armed with the requisite power to enforce the collection of taxes without fail, and to compel the prompt payment of whatever imposts it sees fit to levy for its own support. (Italics ours.)

B

The right of priority of payment of taxes is an attribute of the sovereignty of the Government

Under the civil law, as well as the common law, and apparently without legislation, taxes were accorded priority of payment upon considerations of public policy. Colquhoun, Roman Civil Law, 396. As laid down in the Code of Justinian, C. XII, 62, 63, "*Utilitas publica praeferenda est privatorum contractibus.*" The right of the state to prior payment of the public revenue has been incorporated into the law of practically all modern countries, Sherman, Roman Law in the Modern World, Vol. II, § 364, so that it is not too much to say that in both of the great systems of jurisprudence, the English and the Roman, the sovereign was entitled to priority of payment of taxes as a necessary characteristic of sovereignty.

While the national Government is a government of delegated and enumerated powers, within the limits of those powers it has all the attributes of sovereignty. *In re Debs*, 158 U. S. 564; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 301. In the *Debs* case this Court said (p. 578):

> While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the

> exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the State.

In *Kohl* v. *United States*, 91 U. S. 367, discussing the right of eminent domain, the Court said (p. 371):

> The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. * * * But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal Government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

As we have pointed out, one of the greatest of the sovereign powers of the Government is the power of taxation. Within the limits of that, as of its other powers, the Government has the fullest attributes of sovereignty. As Chief Justice White said in *United States* v. *Bennett*, 232 U. S. 299, 306, the Government's power of taxation "embraces all the attributes which appertain to sovereignty in the fullest sense."

If, then, the Government possesses the fullest attributes of sovereignty with respect to the power

of taxation, it follows that it is entitled *by virtue of its sovereignty alone* to priority of payment of the public revenue. For it is established by the decisions of this Court that if a right, privilege or immunity, which is universally recognized as a characteristic of sovereignty, accords with a sound public policy, promotes the general welfare, and is neither repugnant to the Constitution nor incompatible with the spirit of our institutions, it will be recognized as an attribute of the sovereignty of the United States. The right of priority of payment of the public revenue meets all those requirements. This Court has frequently pointed out the tokens by which sovereign attributes are known in our law.

In *United States* v. *Thompson,* 98 U. S. 486, the question was whether the United States were bound by a state statute of limitations. After referring to the principle that no laches can be imputed to the Government, this Court said (p. 489):

> *The United States possess other attributes of sovereignty resting also upon the basis of universal consent and recognition.* * * * The common law fixed no time as to the bringing of actions. Limitations derive their authority from statutes. The king was held never to be included, unless expressly named. No laches was imputable to him. *These exemptions were founded upon considerations of public policy.* It was deemed important that, while the sovereign was engrossed by the cares and duties of his

> office, the public should not suffer by the negligence of his servants. " In a representative government, where the people do not and can not act in a body, where their power is delegated to others, and must of necessity be exercised by them, if exercised at all, the reason for applying these principles is equally cogent." (Italics ours.)

In *United States* v. *Lee,* 106 U. S. 196, discussing the Government's immunity from suit, the Court said (p. 206):

> It seems most probable that it has been adopted by our courts *as a part of the general doctrine of publicists,* that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts. (Italics ours.)

In *Hill* v. *United States,* 9 How. 386, the question was whether the United States might be sued without their consent. The Court said (p. 389):

> *The question here propounded,* without any necessity for recurrence to particular examples, *would seem to meet its solution in the regular and best-settled principles of public law. No maxim is thought to be better established, or more universally assented to,* than that which ordains that a sovereign, or a government representing the sovereign, can not *ex delicto* be amenable to its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends. (Italics ours.)

In *United States* v. *Kirkpatrick*, 9 Wheat. 720, the question was whether or not laches is imputable to the Government. In behalf of the Court, Mr. Justice Story said (p. 735):

> The general principle is, that laches is not imputable to the government; and *this maxim is founded, not in the notion of extraordinary prerogative but upon a great public policy.* The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. (Italics ours.)

In *United States* v. *Nashville, etc., Ry. Co.*, 118 U. S. 120, the question was whether or not the Government was bound by a statute of limitations. The Court said (p. 125):

> It is settled beyond doubt or controversy—*upon the foundation of the great principle of public policy, applicable to all governments alike,* which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, *asserting rights vested in them as a sovereign government,* are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound. (Italics ours.)

In *The Siren,* 7 Wall. 152, the Court said (p. 153):

> It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. *The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule.* It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. *This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States.* (Italics ours.)

In *Gibson* v. *Chouteau,* 13 Wall. 92, the Court said (p. 99):

> It is matter of common knowledge that statutes of limitation do not run against the State. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and *was founded on the principle of public policy,* that as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. *The principle is applicable to all governments,* which must necessarily act through numerous agents, and is essential to a pres-

ervation of the interests and property of the public. (Italics ours.)

The Government's reply to the petitioner's arguments

What are the arguments which would deny the Government the right to priority of payment of its taxes as an attribute of its sovereignty? It is not contended that the right does not rest upon the basis of universal recognition and consent, or that it is not equally applicable to all governments, or that it is not founded upon public policy, or that it does not promote the public welfare. In fact, the petitioner concedes that priority of payment of the public revenue accords with a sound public policy.

The prerogatives of the British Crown are not the source of the sovereign rights of the United States.

It is asserted that this Court has held that the Government did not inherit (*sic*) the British Crown's prerogative to prior payment of its ordinary debts; that the British Crown enjoyed a single prerogative right to priority of payment which extended to taxes as well as to its debts; and that since the Government did not inherit the prerogative in its one aspect it could not have inherited it in its other. Apparently, some international law of descent is invoked.

We have already demonstrated that the basic fallacy in this argument lies in the assumption that the only possible source of the Government's sover-

eign attributes is the royal prerogatives of the British Crown. We have shown that they have their origin in their universality, their conformity to a sound public policy, their tendency to promote the general welfare and their compatibility with our political institutions. Whence come other sovereign attributes of the United States? Whence come the sovereign attributes of the Roman Empire, of Germany, of France and of other civilized nations? Surely, these latter can not claim to be heirs of the Kings of England. Sovereigns all, are they therefore lacking in the attributes of sovereignty?

However, while the Government does not claim to be possessed of the right to priority of payment of its taxes as a *heritage* from the British Crown, there is nevertheless a solid foundation in the decisions of this Court for the proposition that the United States possess as sovereign rights those prerogatives of the kings of England, which the latter enjoyed as representatives of the English people and which are not incongruous with our republican form of Government.

For example, in *United States* v. *Thompson, supra,* this Court enumerated certain of the sovereign rights and immunities of the Government, and said with respect to them (p. 489):

> When the colonies achieved their independence, each one took these prerogatives, which had belonged to the Crown; and when the national Constitution was adopted, *they*

> *were imparted to the new Government as incidents of the sovereignty thus created.* (Italics ours.)

In *Dollar Savings Bank* v. *United States,* 19 Wall. 227,[10] the Court said (p. 239):

> It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts.

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[10] The petitioner denies the binding force of this case on the authority of *Matter of In re Burrus,* 136 U. S. 586, in which the Court held that a District Court has no authority to issue a writ of *habeas corpus* to restore an infant to the custody of its father, when unlawfully detained by its grandparents. The Court approved and attached to its opinion the opinion delivered by Judge Betts in the Circuit Court, in which he held, in the language of this Court (p. 594), that "his court could not exercise the common law function of *parens patriæ.*" Of course, it is quite clear that Judge Betts was using the phrase *parens patriæ* in its very narrow and technical sense and in quite a different sense from that in which it was used, whether rightly or wrongly, in the *Dollar Savings Bank* case. Furthermore, the latter case has been cited approvingly in *Stanley* v. *Schwalby,* 147 U. S. 508, and in other cases decided after the *Burrus* case. *cf. Commonwealth of Ky.* v. *Dennison,* 65 How. 66, 97, where the Court, speaking of mandamus, said: "It undoubtedly came into use by virtue of the prerogative power of the English Crown * * *. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable."

It may be considered as settled that so much of the royal prerogatives as belong to the King in his capacity of parens patriæ, or universal trustee, enters as much into our political state as it does into the principles of the British constitution. (Italics ours.)

The Government should not be deprived of an attribute of its sovereignty, because the British Crown enjoyed a similar right in the form of a royal prerogative

But even if it be true that the prerogatives of the British Crown in its sovereign capacity did not, in whole or in part, enter as such into our political state, the question remains whether the United States, a sovereign government, are to be denied a universal attribute of sovereignty, which is founded upon public policy and is necessary to the general welfare, because, forsooth, the English sovereign had a similar right which fortuitously took the form of a royal prerogative. It has never before been supposed that great sovereign attributes are stigmatized by that accidental circumstance, or that they are thereby rendered anathema. The Government possesses many rights, privileges, and immunities which, as it happens, were also Crown prerogatives, but which are not repugnant to our institutions. In each case the question of repugnancy is for the Court's determination. *James* v. *Campbell,* 104 U. S. 356.

Thus, the United States are not bound by a statute unless named therein. They may not be sued

without their consent. Laches can not be imputed to them. They may sue in their own name on non-negotiable instruments assigned to them. They are not liable for the misfeasances or unauthorized acts of their agents. No judgment may be rendered against them for costs. A judgment in their favor can not be enjoined. No presumption of payment against them arises from lapse of time.

That these and other rights, privileges and immunities of the Government were likewise Crown prerogatives has always been regarded as immaterial, except as tending to show their applicability to all governments. That they were Crown prerogatives has never been considered a sufficient reason for abridging the sovereignty of the United States.

In *United States* v. *Hewes,* Crabbe, 307 Fed. Cas. No. 15359, the court held that the United States were not affected by an act of Congress because not named therein and said (p. 313):

> This may be called "prerogative," the prerogative of the crown or king. In England it is attached to the king, because he is the Sovereign of the country; but it is attached to the King as the sovereign power, wherever it may reside, and in that sense we may speak of prerogative without any repugnance to the principles of our Constitution, or the spirit of our institutions. It is nothing more than giving certain necessary rights or privileges to the whole community, which are denied to individual citizens on

> principles of public policy and expediency or the "general welfare." Many preferences of this sort, granted to the government, are found in our statutes, and no one has thought of branding them with any odium as "prerogatives."

In *United States* v. *Knight,* 14 Pet. 301, the Court held that the United States were not bound by a statute unless named therein, and said (p. 315):

> The same principle has been decided in New York, Massachusetts, Pennsylvania and, no doubt, in other states; and all upon the same ground. Not upon any notion of prerogative; for even in England, where the doctrine is stated under the head of prerogative, this, in effect, means nothing more than that this exception is made from the statute, for the public good; and the king represents the nation. *The real ground is a great principle of public policy, which belongs alike to all governments,* that the public interest should not be prejudiced by the negligence of public officers, to whose care they are confided. (Italics ours.)

In *United States* v. *Hoar,* 2 Mason 311, Mr. Justice Story pointed out that although the British Crown was not bound by a statute unless expressly named therein, the principle was equally applicable to this Government. He said (p. 313):

> *The true reason,* indeed, why the law has determined that there can be no laches or negligence imputed to the Crown, and, there-

> fore, no delay should bar its right (though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his rights within the times limited to subjects), *is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit and equally applicable to all governments.*

The Government's right to priority of payment of its taxes need not have a statutory origin

The petitioner's argument is fallacious in other respects. It places undue reliance upon the cases of *United States* v. *Fisher,* 2 Cranch 358, *United States* v. *Bank of North Carolina,* 6 Pet. 29, and subsequent decisions of this Court. None of them is authority for the proposition that the Government's right of priority for taxes must have a statutory origin. In none of them was that right involved. In the *Fisher* case, for example, the question was whether the Government, as the holder of a bill of exchange, was entitled to be preferred to general creditors of the bankrupt debtor. That question depended upon the construction and constitutionality of the fifth section of the Act of March 3, 1797 (1 Stat. L. 515), the precursor of R. S. 3466. The Court held that the Act was broad enough to cover a debt due the United States on a

negotiable instrument and that it was constitutional. It was in connection with the latter question that the Court used the language (p. 395), upon which the petitioner places so much stress, "that under a constitution conferring specific powers, the power contended for must be granted, or it can not be exercised."

The power which the Court was discussing was not, as the petitioner intimates, the *right* to priority, but the *power* of Congress to pass a law dealing with priority. No basis can be found in the decision or logic in that or any subsequent case for the proposition that the Government's right to priority for taxes must be granted by the Constitution or by statute or, as the petitioner puts it, by the exercise of a delegated power. To admit that the Government, in common with all sovereigns, has that right, is not to enlarge its delegated powers. It is merely to acknowledge its sovereignty. The argument to the contrary overlooks the fact that by adopting the Constitution the States not only renounced a part of their powers but called into being a sovereign nation. Only its sovereignty explains its possession of numerous rights, privileges and immunities, some of which we have enumerated above, which are granted to it by the Constitution in no other sense than that by the Constitution it is made supreme. That sovereign attributes must be traceable to a specific constitutional or statutory provision is doctrine long since repudi-

ated. In *Boom Co.* v. *Patterson*, 98 U. S. 403, this Court said with respect to the sovereign right of eminent domain: "It requires no constitutional recognition; it is an attribute of sovereignty."

In the *Bank of North Carolina* case, also, the United States claimed priority of payment of a *debt*, not a *tax*, under the Act of 1797. As the Court said (p. 35), the claim did not stand upon any sovereign prerogative, but was "founded exclusively upon the actual provisions of their own statutes." The Court referred to the Crown prerogative only as an aid to the interpretation of the statute. It found that the policy of the prerogative might be traced into the statute, and held that since the policy of the prerogative had "mainly a reference to the public good," the statute should receive no strict construction.

In *United States* v. *Canal Bank*, Fed. Cas. No. 14715, the question involved was whether the Government had priority for a *debt*, not a *tax*, for which it had attached property of the debtor, as against other creditors whose attachments were of an earlier date. It was in connection with that problem and on the basis of the *Fisher* and similar cases that the court said (p. 278) that it had long been settled by the decisions of this Court "that the United States do not possess any general right of priority or privilege over private creditors, for the satisfaction of the *debts* due to them, founded upon any general prerogative, belonging to the Government

in its sovereign capacity." Of course, taxes were not in the court's mind. Nevertheless, the petitioner makes that language the basis of a contention that since there was a single prerogative right which extended to debts and taxes alike, the Government can not possess one branch of it since it does not possess the other.

The fact that the Government has no sovereign right to priority of payment of its debts is immaterial

The argument has obvious weaknesses. It overlooks the intrinsic difference between debts and taxes and the paramount importance of the latter. It assumes that the Government must possess the right which it claims, if at all, by way of the royal prerogative, an assumption which we have already shown to be unfounded. It attributes to the prerogative a quality of indivisibility which the House of Lords seems disposed to deny to it. In *Food Controller* v. *Cork* [1923] A. C. 647, priority was sought as a prerogative right for the purchase price of personal property which a government agency had sold a corporation that was being wound up under the Companies Act of 1908. The House of Lords held that that Act and other statutes in *pari materia* had cut down the royal prerogative in cases to which they applied, and that under them the Crown was entitled to priority only for taxes. However, several of the law Lords took occasion to question that a debt of the kind involved in the

case was longer included within the scope of the royal prerogative of priority.

For example, in the course of his opinion in the *Cork* case, Lord Shaw of Dunfermline, speaking of *Commissioners of Taxes for New South Wales* v. *Palmer* [1907] A. C. 179, which is cited by the petitioner at page 12 of his brief, said (p. 666):

> My Lords, I venture to interpose much doubt as to the application or extension of the expression used by Macdonald C. B., "that where the King's and the subject's title concur the King's shall be preferred," and the modernization of it given by Lord Macnaghten, to cases of ordinary commercial or industrial contracts entered into by a Government department in the course of the business or enterprise which it carries on. * * * But if the propositions above cited should ever be used to justify or widen the royal prerogative by the inclusion of ordinary contracts into the range of privilege, then it is, I think, very important to realize that this dictum of Lord Macnaghten's occurred in a case in which the nature of the debts, as Crown debts, and that in a very strict sense, was clear beyond all question. The claim of the Crown in the *Palmer Case* was in respect of "the sum of 53 l. for land and income tax and fine, * * *." There, accordingly, the Crown debt was clear as such and as being within a definite sphere of action plainly within the law applicable to the royal prerogative.

He then pointed out the character of the debt involved in the *Cork* case and said (p. 667):

> My opinion is now delivered with the most complete reservation of the point whether facts of such a nature could ever permit of the debt which has arisen being treated as a Crown debt within the scope of the royal prerogative.
>
> How is this a Crown debt? It springs out of no power vested in the Crown by way of the imposition of a duty or a tax. * * * The debt arises purely in commercio.

Thus, while the highest court in England exhibits a tendency so far to divide the royal prerogative as to allow the Crown priority for taxes but to deny it preference for debts, the petitioner argues that the Government has no sovereign right of priority for taxes because it has none for debts. The petitioner refuses to see the difference in policy between the two priorities which this Court saw a century ago and which is now manifest to the English courts.

American courts, also, have recognized the divisible character of the royal prerogative. *Baxter* v. *Baxter,* 23 S. C. 114, 118. In *State* v. *Rowse, supra,* the Court said (p. 592):

> By the common law all debts due the Crown were preferred to claims of private citizens. So far as taxes are concerned, every consideration requires that this rule be rigidly observed. * * * If the claim

of the State were an ordinary one, such as might arise on behalf of an individual, the authorities cited might show that its priority was lost by the assignment, but the obligation to pay taxes can never be so considered, although there may be no express statutory provision upon the subject.

Furthermore, even if it were true that the royal prerogative for debts and taxes rested alike upon the maxim enunciated by Lord Coke in Quick's case (1604), 9 Rep. 129a: "*Quando jus domini regis et subditi concurrent jus regis praeferri debit,*"[11] the inapplicability of the maxim to our form of Government would mean nothing. In several instances this Court has recognized that the Government has attributes of sovereignty which the Crown enjoyed as royal prerogatives, although the reasons out of which the prerogatives sprang are not consonant with American political philosophy.

[11] The Crown's prerogative of priority did not originate in Lord Coke's maxim, which was simply his rationalization of a right which had long existed as one of the privileges which the king had in common with lesser feudal lords. It originated in connection with the king's feudal dues, which were, of course, in the nature of taxes, apparently long before any tax, except the Danegeld, was known in England. Later it was naturally extended to taxes. Similarly, by the extension of old and the invention of new prerogatives the various powers of the developing English state were accounted for. Thus, almost every power of government was once embodied in the mass of royal prerogatives. In the constitutional struggles of the 17th century most of them were diverted to the King in Parliament. They then ceased to be known as prerogatives and became ordinary powers of government, such as the power to levy taxes. However, for historical reasons, the right to priority of payment of taxes continued to be known as a prerogative in common with other procedural rights. 2 Holdsworth, History of English Law, 458 *et seq.*; 4 id. 22 *et seq.*; 1 Bl. Com. (Lewis Ed.), 239 *et seq.*

United States v. *Hoar, supra; Langford* v. *United States,* 101 U. S. 341; *Gibbons* v. *United States,* 8 Wall. 269.

In the *Langford* case the Court pointed out that the maxim of English constitutional law that the King can do no wrong is not applicable to our institutions. That maxim, however, is the foundation of the immunity of the British Crown from suit, an immunity which this Government also possesses.

The fact that the Government has never adopted the common law is immaterial

Other arguments of the petitioner may be briefly noted. The argument that the Government does not have the sovereign attribute which it claims, because it never adopted the common law[12] as the foundation of its jurisprudence, involves the same unwarranted assumption, to which we have several times referred, that the Government must find the source of its sovereign attributes in the royal prerogatives. Pushed to its logical conclusion, the argument would deny to the United States any qualities of sovereignty except those specifically enumerated in the Constitution or in statutes, and yet, as we have pointed out, it has many rights, privileges and immunities merely because it is sovereign. The petitioner misses the point entirely when he contends that the possession by the Government of other sovereign attributes does not prove

[12] This general proposition is, of course, subject to exceptions. *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S. 92, 101; *Smith* v. *Alabama*, 124 U. S. at p. 478.

the existence of a right to priority for taxes. Of course, it does not, but it does prove that if a given attribute of sovereignty, whether it be the right to priority for taxes or some other, is based on a sound public policy, tends to promote the public welfare, and is compatible with our political institutions, it is an attribute of American as well as of other sovereignties, although we have neither inherited the Crown's prerogatives nor adopted the common law.

R. S. 3466 does not measure the Government's right to priority for taxes

The petitioner also contends that R. S. 3466 defines the limits of the Government's priority for taxes. His argument involves the application of the maxim of express mention and implied exclusion. There can be little doubt, after what we have said, that when Congress passed the Act of March 3, 1797 (1 Stat. L. 515), the fifth section of which eventually became R. S. 3466, the Government was entitled as a matter of right to priority of payment of its taxes. No case can be found in which that right had theretofore been questioned. The maxim upon which the petitioner relies is therefore inapplicable here. *Shurtleff* v. *United States,* 189 U. S. 311. Even if the Act of 1797 applied to taxes as well as to debts, it was clearly not the legislative intention to limit the Government's priority for taxes to the instances enumerated in that Section.

It is quite evident that the primary purpose of Section 5 of the Act of 1797 was to create a pref-

erence for *debts* due the United States arising out of duty and tax bonds and from receivers of public money. *United States* v. *Fisher, supra.* That is shown by the language of earlier statutes,[13] by the title and provisions of the Act of 1797,[14] and by the fiscal system in existence when it was passed. At that time import duties were the chief source of public revenue. Internal revenue played only an insignificant part in the fiscal system of the day.[15] However, in the case of every duty and in the case of every tax except one[16] the taxpayer could at his option either pay the impost or secure its payment by bond. Doubtless, the instances in which the taxpayer did neither, were rare, so that unpaid duties and taxes were usually secured by bonds. However, existing statutes provided only for the priority of debts arising out of duty bonds. There was none for those arising out of tax bonds or the receipt of public money.

To meet that situation the Act of 1797 created priority in every case for debts due the Government by " any revenue officer, or other person here-

[13] Act of July 31, 1789, § 21, 1 Stat. 29; Act of August 4, 1790, § 45, 1 Stat. 145; Act of May 21, 1792, § 18, 1 Stat. 259.

[14] "An Act to provide more effectually for the settlement of accounts between the United States and the receivers of public money."

[15] Prior to March 3, 1797, internal taxes had been levied in only five cases. By the Act of March 3, 1791 (1 Stat. 203, 204), duties were laid on distilled spirits and private stills; by the Act of June 5, 1794 (1 Stat. 373, 376, 384), on carriages for the conveyance of persons, on licenses for selling wines, etc., and on snuff and refined sugar; and by the Act of June 9, 1794 (1 Stat. 397), on property sold at auction.

[16] The tax on carriages for the conveyance of persons levied by the Act of June 5, 1794, 1 Stat. 373.

after becoming indebted to the United States, by bond or otherwise." It is perfectly clear, therefore, that taxes were only remotely, if at all, in the legislative consciousness. Debts were uppermost, if not exclusively, in the legislative mind. It is true that these were debts arising in connection with the public revenue, but they were nevertheless debts. If the statute covers taxes it does so only incidentally and only because it contains general terms which may be sufficiently broad to comprehend every kind of obligation owing to the Government. The statute nowhere mentions taxes. It is interesting to note that the compilers of the Revised Statutes placed R. S. 3466 in the chapter of the Revised Statutes dealing with debts rather than in the chapter dealing with taxes.

Under the circumstances it seems clearly unreasonable to impute to the Congress which passed the Act of 1797, an intention to make that Act the sole measure of the Government's priority for taxes. That result can only be reached by employing the maxim of express mention and implied exclusion to defeat rather than to ascertain the legislative intent. As said in *Colquhoun* v. *Brooks*, 19 Q. B. Div. 406, the maxim is " often a valuable servant but a dangerous master to follow in the construction of statutes and documents. The ' exclusio ' is often the result of inadvertence or accident * * *."

The absence of any legislative intent to make the Act of 1797 exclusive is shown by its saving clause, Section 7, which provides:

> And be it further enacted, that nothing in this Act shall be construed to repeal, take away, or impair any legal remedy or remedies for the recovery of debts, now due, or hereafter to be due to the United States, in law or in equity, from any person or persons whatsoever, which remedy or remedies might be used if this Act were not in force.

CONCLUSION

The question for decision in this case is one of first impression in this Court. It is not only difficult but important, involving as it does the public revenue. Neither formula nor authority points unerringly to its solution. Counsel for the Government would be less than frank with the Court if they should contend otherwise. Neither party to this controversy may claim an exclusive alliance with logic. However, the logic of the argument that would deny the Government priority in the payment of the public revenue is dry and artificial, concerned only with premises and other syllogistic requirements, whereas the logic of the Government's position takes into consideration the essential character and paramount importance of a tax and reaches a conclusion which accords with the dictates of a public policy so sound that it is recognized throughout the civilized world. Unham-

pered by binding precedents, this Court is free to fashion the law upon the pattern of public necessity and the general welfare.

The decree appealed from should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

JEROME MICHAEL,
HENRY GALE,
RALPH F. FUCHS,
Special Assistants to the Attorney General.

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SUPREME COURT OF THE UNITED STATES.

No. 454.—October Term, 1925.

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Leo A. Price, as Receiver of J. M. Gidding & Company, Petitioner, *vs.* United States of America.	Writ of Certiorari to United States Circuit Court of Appeals, Second Circuit.

[January 11, 1926.]

Mr. Justice Butler delivered the opinion of the Court.

October 2, 1923, Charles H. Mears, a simple contract creditor, brought suit on behalf of himself and other creditors against J. M. Gidding & Company, a New York corporation. Among the facts alleged in the complaint are these. Defendant was engaged in the business of importing and selling wearing apparel at retail in New York and four other cities. It owed plaintiff $10,000 on a promissory note; its debts were large, and it was without money to pay those then due and shortly to become due. If its assets could be sold in the usual course of business they would be in excess of its debts. Some of the creditors were pressing their claims, and others had commenced suit; and, if the assets were not taken into judicial custody, some creditors might obtain inequitable preferences as against plaintiff and other creditors; and the assets might not be enough to pay all. And, averring no adequate remedy at law, the complaint prayed the court to determine the rights of all creditors, and to appoint a receiver to take possession and control of all defendant's assets, and that, when just and proper, the assets be ordered sold and the proceeds distributed to those entitled thereto. On the same day, defendant filed its answer admitting the allegations and joining in the prayer of the complaint. The court immediately entered its decree granting the relief prayed, and appointed appellant temporary receiver with authority to take possession and control of, and to make disbursements to preserve, the assets. January 9, 1924, the court appointed appellant permanent receiver. Thereupon, the assets were found insufficient

to pay all the claims; general creditors will not receive more than 40 per cent.

The United States filed proof of claims for income taxes for the year 1920, and for unpaid customs duties. A special master sustained the claim of the United States to priority, and fixed the amount of the income tax at $11,331.07, and the amount of the duties at $1,086.70. The District Court directed appellant, out of the assets of defendant, to pay these amounts as priority claims. The Circuit Court of Appeals affirmed the decree on the authority of *Liberty Mutual Insurance Company* v. *Johnson Shipyards Corporation,* 6 Fed. (2d) 752. The case is here on writ of certiorari. § 240, Judicial Code.

The word "debts" as used in R. S. § 3466 includes taxes.

The claim of the United States does not rest upon any sovereign prerogative; but the priority statutes were enacted to advance the same public policy which governs in the cases of royal prerogative; that is, to secure adequate public revenue to sustain the public burdens. *United States* v. *The State Bank of North Carolina,* 6 Pet. 29, 35. And to that end, § 3466 is to be construed liberally. Its purpose is not to be defeated by unnecessarily restricting the application of the word "debts" within a narrow or technical meaning. Cf. *Miller* v. *Robertson,* 266 U. S. 243, 248. The meaning properly to be attributed to that word depends upon the connection in which it is used in the particular statute and the purpose to be accomplished.

In the absence of another remedy made exclusive, an action of debt lies to recover taxes where the amount due is certain or readily may be made certain. *United States* v. *Chamberlin,* 219 U. S. 250, 262; *Savings Bank* v. *United States,* 19 Wall. 227, 239; *Stockwell* v. *United States,* 13 Wall. 531, 542; *Meredith* v. *United States,* 13 Pet. 486, 493; *United States* v. *Washington Mills,* 2 Cliff. 601, 607; *United States* v. *Pacific Railroad,* 4 Dill. 66.

Section 3466 of the Revised Statutes is derived from early statutes enacted for the collection of taxes.* The Act of 1789 per-

*"An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States", approved July 31, 1789, § 21, c. 5, 1 Stat. 29, 42. "An Act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels", approved August 4, 1790, § 45, c.

mitted bonds to be given for payment of customs duties, and provided that in case of default the collector should prosecute suits for recovery, and that in all cases of insolvency, or where any estate in the hands of executors or administrators should be insufficient to pay all the debts of the deceased, the debt due to the United States on any such bonds should be first satisfied. The Act of 1790 superseded the earlier Act, but retained the same priority provision. The Act of 1792 gave to sureties the right of subrogation (see R. S. § 3468); and it limited priority to cases in which insolvency should be manifested in one of the modes stated. Prior to the passage of the Act of 1797, an internal revenue had been established and extensive transactions had taken place, in the course of which many persons had become indebted to the United States. *United States* v. *Fisher*, 2 Cranch 358, 392. Up to that time, the priority applied only to cases of default on customs bonds. By that Act, it was extended to cases involving "any revenue officer or other person hereafter becoming indebted to the United States by bond or otherwise." The Act of 1799 introduced the provision making every executor, administrator, assignee or other person answerable for failure to pay the United States first. See R. S. § 3467. The revision did not involve any substantial change of phraseology and did not work any change in the purpose or meaning of the priority acts. *Buck Stove Company* v. *Vickers*, 226 U. S. 205, 213. There is no reason for any distinction in respect of priority between taxes and other amounts owing to the United States. Indeed, it would be quite without reason to deny priority in case of claims for taxes due from taxpayers, and to give priority to claims against revenue officers and others on account of taxes collected by them.

Lane County v. *Oregon*, 7 Wall. 71, and *Meriwether* v. *Garrett*, 102 U. S. 472, are sometimes cited, and expressions found in the opinions are quoted, to show that taxes are not debts. But when regard is had to the questions decided in these cases, it is clear that

35, 1 Stat. 145, 169. "An Act for raising a farther sum of money for the protection of the frontiers, and for other purposes therein mentioned", approved May 2, 1792, § 18, c. 27, 1 Stat. 259, 263. "An Act to provide more effectually for the Settlement of Accounts between the United States, and Receivers of public Money", approved March 3, 1797, § 5, c. 20, 1 Stat. 512, 515. "An Act to regulate the collection of duties on imports and tonnage", approved March 2, 1799, § 65, c. 22, 1 Stat. 627, 676.

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they do not sustain the view that, as used in § 3466, the word "debts" does not include taxes due the United States. The question in *Lane County* v. *Oregon* was whether under the Acts of Congress making United States notes "legal tender in payment of all debts", the State was bound to accept such notes in payment of taxes required by its own laws to be paid in gold and silver coin. The court held that the Acts had no reference to taxes imposed by state authority. There were two clauses which were intended to give currency to the notes. In one of them, taxes were plainly distinguished from debts; and it was held that the word "debts" in the other was not intended to include taxes. In *Meriwether* v. *Garrett,* it was held that taxes levied before the repeal of a city charter—other than those levied under lawful contract or judicial direction—could not be continued in force by the court after the repeal of the charter; that they had none of the elements of property and could not be seized by judicial process, and could only be collected under authority from the legislature.

Defendant made a voluntary assignment of its property within the meaning of § 3466.

By answering and joining in the prayer of the complaint, defendant cooperated with the plaintiff to secure the appointment of a receiver to whom it immediately handed over possession and control of all its property and business. While in effect the complaint alleged that defendant was solvent, the facts set forth indicate that it was in a failing condition. And it was found to be insolvent within a short time after the appointment of the receiver. When the assets turned out to be less than the debts, the creditors were entitled to have them dealt with as a trust fund and distributed among them according to their rights and priorities. Under the statute, claims of the United States must first be satisfied. *Bramwell* v. *United States Fidelity & Guaranty Company,* and *United States* v. *Butterworth-Judson Corporation,* decided this day.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.